79-521
No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

CONSUMER PRODUCT SAFETY COMMISSION, ET AL.,
PETITIONERS

v.

GTE SYLVANIA, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No.

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Consumer Product Safety Commission, *et al.*,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

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[1] The petitioners in this case are the Commission and certain of its officials and employees, all of whom are defendants in actions brought by respondents to enjoin the disclosure of documents under the Freedom of Information Act. See pages 3-6, *infra*.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-70a) is reported at 598 F.2d 790. The opinion of the district court (App. C, *infra*, 77a-104a) is reported at 443 F. Supp. 1152.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 71a-76a) was entered on April 30, 1979. On July 20, 1979, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including August 28, 1979, and on August 21, 1979, he further extended the time to and including September 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 6(b)(1) of the Consumer Product Safety Act, 15 U.S.C. 2055(b)(1), applies to the disclosure of records by the Consumer Product Safety Commission pursuant to a request under the Freedom of Information Act.

STATUTE INVOLVED

Section 6(b)(1) of the Consumer Product Safety Act, 15 U.S.C. 2055(b)(1), provides:

> Except as provided by paragraph (2) of this subsection, not less than 30 days prior to its public disclosure of any information obtained under this chapter, or to be disclosed to the public in connection therewith (unless the Commission finds out that the public health and safety requires a lesser period of notice), the Commission shall, to the extent practicable, notify and provide a summary of the information to, each manufacturer or private labeler of any consumer product to which such information pertains, if the manner in which such consumer product is to be designated or described in such information will permit the public to ascertain readily the identity of such manufacturer or private labeler, and shall provide such manufacturer or private labeler with a reasonable opportunity to submit comments to the Commission in regard to such information. The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this chapter. If the Commission finds that, in the administration of this chapter, it has made public disclosure of inaccurate or misleading information which reflects adversely upon the safety of any consumer product, or the practices of any manufacturer, private labeler, distributor, or retailer of consumer products, it shall, in a manner similar to that in which such disclosure was made, publish a retraction of such inaccurate or misleading information.

STATEMENT

1. In 1972, Congress enacted the Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207,

15 U.S.C. 2051 *et seq.*, in order "to protect the public against unreasonable risks of injury associated with consumer products" and "to assist consumers in evaluating the comparative safety of consumer products" (15 U.S.C. 2051(b)(1) and (2)). The Act established the Consumer Product Safety Commission to carry out the statutory purposes. 15 U.S.C. 2053.

In 1974, the Commission initiated an administrative proceeding to examine the safety of television sets. See 39 Fed. Reg. 10929 (1974). In connection with that proceeding, the Commission obtained from respondents, who are television manufacturers, reports of television-related accidents (*e.g.*, fires, electric shocks, etc.). The Commission acquired this information (more than 120,000 pieces of paper) partly through requests and partly through special orders and subpoenas issued under 15 U.S.C. 2076(b)(1) and (3). Claims of confidentiality accompanied the information submitted by most of the manufacturers (App. A, *infra*, 11a-12a).[2]

In June 1974, Consumers Union of the United States, Inc., and Public Citizen's Health Research

[2] To reduce the information obtained to a manageable form, the Commission retained a private company to catalogue the accident data. In addition, a Commission consultant helped to process, analyze and summarize the data. As a result of these efforts, "the Commission now has nine file cabinets containing information on 7,620 TV-related accidents, each of which is in a separate file folder under the manufacturer's name." See C.A. App. 455. ("C.A. App." refers to the Joint Appendix to the briefs in the court of appeals.)

Group requested the Commission to disclose the television-related accident reports under the Freedom of Information Act, 5 U.S.C. 552 ("FOIA"). The Commission disclosed portions of the reports as to which no claim of confidentiality had been made. With respect to the rest, it directed the manufacturers to substantiate their claims of confidentiality (App. A, *infra*, 13a).

On April 8, 1975, after further communication with the manufacturers and the requesters, the Commission informed the parties of its legal determination that the requested reports were not exempt from mandatory disclosure under the FOIA and notified them that it would release all of the reports except for the identity of accident victims and any documents subject to the attorney-client privilege or the attorney-work product doctrine (C.A. App. 456). The Commission added that the release of the data would be accompanied by a statement that "the information could be misleading because some television manufacturers maintained more complete accident reports than other manufacturers" (C.A. App. 95, 459).[3]

[3] In *Pierce & Stevens Chemical Corp.* v. *United States Consumer Product Safety Commission*, 585 F.2d 1382, 1388 n.28 (1978), which also involved a suit to enjoin a Commission disclosure under the FOIA, the Second Circuit noted that the Commission had offered to include with the disclosed records in that case a statement by the manufacturer regarding alleged inaccuracies in the records. The court commended the procedure, stating that, although not required by law, "this procedure is a sensible and fair accommodation of the manufacturers' and labelers' interests and we encourage the Com-

The manufacturers objected to disclosure of the reports. They claimed that the information was of a confidential nature, that it had been compiled in connection with an administrative investigation, and that it was exempt from mandatory disclosure under Exemptions 4 and 7 of the FOIA, 5 U.S.C. 552(b)(4) and (7), and was barred from disclosure by the FOIA and the Trade Secrets Act, 18 U.S.C. 1905 (see C.A. App. 85-93).

2. In April and May 1975, respondents (13 television manufacturers) instituted separate suits in the United States District Court for the District of Deleware and other federal district courts, seeking to enjoin the Commission and certain of its officers and employees from disclosing the television-related accident reports pursuant to the FOIA requests. The complaints reiterated the manufacturers' previous claims that the disclosure would violate the FOIA and the Trade Secrets Act. The complaints also alleged, for the first time, that disclosure would violate Section 6(b)(1) of the Consumer Product Safety Act, 15 U.S.C. 2055(b)(1) (see C.A. App. 51-65, 105-231).

Section 6(b)(1) provides in pertinent part that "not less than 30 days prior to [the Commission's] public disclosure of any information obtained under this chapter," the Commission shall notify each manufacturer or labeler to whom the information pertains and whose identity can be readily identified from the information of the intended disclosure and give it an opportunity to comment on the disclosure. The section further provides:

> The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this chapter.

Furthermore, if the Commission finds that it has publicly disclosed inaccurate or misleading information reflecting adversely on any manufacturer's products or practices, Section 6(b)(1) requires it to "publish a retraction" in a manner "similar to that in which such disclosure was made."

Respondents asserted, among other things, that the "information contained in the materials to be disclosed is inaccurate and misleading; and disclosure would not be fair in the circumstances or reasonably related to effectuating the purposes of the Consumer Product Safety Act" (see, *e.g.*, C.A. App. 63).

3. Respondents' suits were consolidated in the United States District Court for the District of Delaware. On October 23, 1975, the district court entered a preliminary injunction prohibiting the Commission from disclosing the requested documents. *GTE Sylvania Inc.* v. *Consumer Product Safety Commission*, 404 F. Supp. 352. On December 8, 1977, the district

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mission to continue the practice." *Ibid.* The Commission has generally followed this procedure whenever a manufacturer or labeler of a consumer product has objected to this kind of disclosure.

court permanently enjoined the Commission from disclosing the documents (App. B, *infra*, 71a-104a). The court rejected the Commission's contention that Section 6(b)(1) applies only when the Commission affirmatively undertakes to disclose information to the public, but not when it merely complies with a request for information under the Freedom of Information Act. The court held that Section 6(b)(1) is applicable to disclosures pursuant to FOIA requests and that it is a withholding statute within the meaning of Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3). The court also found that the Commission failed to comply with the Section 6(b)(1) procedures and that release of the accident reports would therefore be contrary to the Act (App. B, *infra*, 97a-98a).[4]

[4] The requesters, Consumers Union and the Health Research Group, deliberately chose not to intervene in this action (App. A, *infra*, 18a). Instead, on May 5, 1975, they brought suit under the FOIA in the United States District Court for the District of Columbia seeking to compel the Commission to release the identical documents at issue in this case. That lengthy and "tortuous" litigation (App. A, *infra*, 18a), which is now before this Court in *GTE Sylvania, Inc.* v. *Consumers Union of the United States*, No. 78-1248, presents the question whether the District of Columbia Circuit erred in holding that the permanent injunction obtained by respondents in the District of Delaware does not bar the requesters from litigating their separate FOIA action in the District of Columbia.

Consumers Union and the Health Research Group appeared in this case for the first time in the court of appeals as amici curiae to argue that they were indispensable parties within the meaning of Fed. R. Civ. P. 19 and that respondents' complaints should therefore have been dismissed in their absence. The court of appeals rejected this argument (App. A, *infra*, 20a-26a).

The court of appeals affirmed. It agreed with the district court that Section 6(b)(1) applies to disclosures pursuant to FOIA requests and that it is a withholding statute within the meaning of Exemption 3 (App. A, *infra*, 26a-70a). The court refused to follow the recent decision of the Second Circuit in *Pierce & Stevens Chemical Corp.* v. *United States Consumer Product Safety Commission*, 585 F.2d 1382, 1388-1389 (1978), which specifically held that "the procedures of Section 6(b)(1) do not apply when the Commission merely responds to a request under the FOIA."[5]

REASONS FOR GRANTING THE PETITION

This Court's review of the decision below is needed to resolve a conflict among the circuits on a recurring question of great importance to the Consumer Product Safety Commission.

1. As the court of appeals acknowledged (App. A, *infra*, 35a-36a), its decision is in direct conflict with *Pierce & Stevens Chemical Corp.* v. *United States Consumer Product Safety Commission*, 585 F.2d 1382 (2d Cir. 1978). In that case, the Second Circuit upheld the Commission's contention that Section 6(b)

[5] In view of their conclusion that Section 6(b)(1) of the Consumer Product Safety Act prohibits disclosure of the accident reports, neither the district court nor the court of appeals reached respondents' further claims that disclosure would contravene Exemptions 4 and 7 of the FOIA (claims that would now seem to be foreclosed by *Chrysler Corp.* v. *Brown*, No. 77-922 (Apr. 18, 1979) and 18 U.S.C. 1905.

(1) of the Consumer Product Safety Act was intended to apply only to situations in which the Commission discloses information to the public on its own initiative—either in the exercise of its explicit statutory duty to "disseminate * * * information relating to the [adverse effects of] consumer products" (15 U.S.C. 2054(a)(1)), or otherwise in publicly expressing its own views (*e.g.*, in a press release, press conference, speech or publication—but is inapplicable when the Commission merely responds to a request under the FOIA. 585 F.2d at 1386-1389. The court concluded that the language of Section 6(b)(1), its relation to the rest of the statute and its legislative history all indicate that it was designed to deal only with problems that may arise when the Commission disseminates information on its own initiative and to the public at large but that do not arise when the Commission does nothing more than comply with an FOIA request for discrete documents by a particular individual or group—namely, the danger that the Commission itself may unfairly focus adverse publicity on a business or product and that the public will tend to view such Commission-initiated disclosures as having been approved and verified by the federal government and thus to accord them special significance. 585 F.2d at 1387-1388.

In this case, the Third Circuit has held to the contrary. It has concluded that the Commission may not disclose information requested under the FOIA unless it undertakes all the steps set forth in Section 6(b)(1) of the Act. This conflict is particularly

troublesome because it threatens to subject the Commission to irreconcilable obligations: if the agency were to adopt the Third Circuit's view and decline to disclose information requested under the FOIA on the ground that it has not been able to verify the accuracy of the information requested, it is likely to be sued by the requester in the Second Circuit. On the other hand, if the Commission were to follow the Second Circuit's view, it faces the possibility of a lawsuit by the submitter in the Third Circuit.[6] Unless this Court resolves the conflict, the Commission will be uncertain of its legal obligations upon receipt of an FOIA request for identifiable documents in its possession, and it may even be bound by inconsistent judgments of two different courts, as this case and the related case now pending before the Court (*GTE Sylvania, Inc.* v. *Consumers Union of the United States*, No. 78-1248) manifestly illustrate. See note 4, *supra*.

2. The dilemma created by the court of appeals' decision is a recurring one of great importance to the Consumer Product Safety Commission. The deci-

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[6] This is so because the venue provisions of the FOIA and 28 U.S.C. 1391(e) accord requesters and submitters a broad choice of forums in which to litigate their claims. 5 U.S.C. 552(a)(4)(B) gives the district courts jurisdiction over FOIA complaints brought in the district "in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia * * *." 28 U.S.C. 1391(e) allows suits against federal officers to be brought in any district in which a defendant resides, the cause of action arose, or the plaintiff resides if no real property is involved in the action.

sion below either would impose a substantial, if not impossible, administrative burden on the agency to verify the accuracy of the information it produces pursuant to the FOIA or would effectively preclude it from complying with most FOIA requests. Either result would seriously impair the Commission's exercise of its statutory functions and responsibilities.

The Consumer Product Safety Act directs the Commission to obtain information concerning product-related injuries and to communicate that information to the public. 15 U.S.C. 2054(a)(1). Pursuant to this statutory directive, the Commission acquires a substantial amount of information, including approximately 10,000 consumer complaints each year, concerning the safety of particular products. The Commission estimates that 95% of the information it obtains identifies a manufacturer, and a significant portion of that information is the subject of FOIA requests. Thus, in 1978 alone, the Commission received approximately 7,800 FOIA requests, some 60 to 70% of which related to consumer complaints.

The court of appeals' ruling prohibits the Commission from complying with these FOIA requests unless it undertakes an investigation in each case to determine whether each item of information requested is accurate and whether disclosure would be fair in the circumstances and reasonably related to the purposes of the Act. Because those facts are rarely apparent from the face of the documents requested or the requests themselves,[7] such particularized investigations

[7] If, as the court below held, the Commission must comply fully with Section 6(b)(1) before it may respond to an FOIA request, it would have to determine not only whether each item of information requested is accurate but also, presumably, whether disclosure of the information "is fair in the circumstances and reasonably related to the purposes of [The Act]." 15 U.S.C. 2055(b)(1). The latter determination would depend (at least arguably) on the interests of the requester. Disclosure of information for one purpose may be related to the goals of the Act whereas disclosure of the same information for another purpose may not be so related. See 15 U.S.C. 2051(b). Hence, the Commission might be required to inquire into the requester's motives—a precarious inquiry at best and one that is contrary to the normal rules under the FOIA. This is one of the anomalous consequences that supports our contention that Section 6(b)(1) was not intended to apply to Commission responses to FOIA requests.

(*e.g.*, to determine whether a complaining consumer had been injured as he alleged) would require an enormous expenditure of administratiev time and resources.[8] Indeed, because the task imposed by the court of appeals would be beyond the ability of the Commission to perform in more than a handful of cases, consistent with its other statutory functions, the practical effect of the court's ruling would be to prevent the Commission from complying with most FOIA requests for information in its possession, a result that would be contrary to the basic purposes of both the Consumer Product Safety Act and the Freedom of Information Act.

3. We submit that the decision below is incorrect for the reasons stated by the Second Circuit in *Pierce*

[8] The present case exemplifies the crippling effect that applying Section 6(b)(1) to FOIA requests would have on the Commission. In order to process the FOIA requests in this case in compliance with the Third Circuit's decision, the Commission would be required to investigate the accuracy of each of the 7,620 accident reports submitted by respondents.

& Stevens Chemical Corp. v. *United States Consumer Product Safety Commission, supra.* As the Second Circuit observed, "the phrase 'public disclosure', used in the title to Section 6 and repeated several times in subsection (b)(1), does imply something more than simply furnishing information upon request." 585 F.2d at 1387. Furthermore, the court noted that, under the last sentence of Section 6(b)(1), "if the Commission has erred by disclosing inaccurate or misleading information, it must '*publish* a retraction' of that information '*in a manner similar* to that in which such disclosure was made.'" (*ibid.*; emphasis in original). Since the FOIA does not require an agency to "publish" requested information or permit it to edit or amend such information for accuracy, the court correctly concluded that "[t]his language seems to envision agency-initiated publicity, via press release or otherwise, rather than a mere request for a document under the FOIA." *Ibid.*[9]

The Second Circuit also found support for the Commission's interpretation of Section 6(b)(1) in the legislative history of the Consumer Product Safety Act. 585 F.2d at 1387 & n.23. In discussing a

[9] As the court further explained (585 F.2d at 1388):

> [S]ection 6(b)(1) obviously contemplates that, in an appropriate case, the Commission review and rewrite a document prior to its release to make it accurate. But under the FOIA, an agency does not rewrite a document or create informational material. It discloses existing documents which it has already prepared.

See also *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 161-162 (1975).

1976 amendment to Section 29(e) of the Act, 15 U.S.C. 2078(e), the Conference Committee Report declared:

> The requirement that the Commission comply with section 6(b) prior to another Federal agency's public disclosure of information obtained under the Act is not intended by conferees to supersede or conflict with the requirements of the Freedom of Information Act (5 U.S.C. 552 (a)(3) and (a)(6). *The former relates to public disclosure initiated by the Federal agency while the latter relates to disclosure initiated by a specific request from a member of the public under the Freedom of Information Act.*

H.R. Conf. Rep. No. 1022, 94th Cong., 2d Sess. 27 (1976) (emphasis supplied).[10]

[10] The Third Circuit ascribed little weight to the views expressed in the Conference Committee Report on the grounds that (1) it constituted "subsequent legislative history" (App. A, *infra*, 54a-55a); (2) the Conference Committee's views about Section 6(b) were "erroneous" (*id.* at 56a); and (3) the report dealt primarily with the 1976 amendment that added Section 29(e), which "by its terms, does not interpret the scope of section 6(b)" (*id.* at 55a).

None of those grounds withstands analysis. First, the report is not the kind of "subsequent legislative history" that is entitled to little weight, because it discussed extensive and comprehensive amendments to the Act that Congress in fact adopted. In these circumstances, the Conference Committee's views on the meaning of the Act before its amendment are significant evidence of Congress's understanding of both the original and amended statute. Second, Section 29(e) is closely related to Section 6(b) and indeed refers to Section 6(b). Section 29(e) allows the Commission to provide other state and federal agencies with consumer accident reports or in-

Finally, the Second Circuit found that the Commission's interpretation "is further supported by the inconsistency between Section 6(b)(1) and the scheme of the FOIA" (585 F.2d at 1387). The FOIA requires that agencies make records "promptly available to any person" (5 U.S.C. 552(a)(3)) and that an agency respond to FOIA requests within 10 days and decide administrative appeals within 20 days (5 U.S.C. 552(a)(6)(A)(i) and (ii)). The FOIA also mandates accelerated judicial review: FOIA cases shall "take precedence" on the district court's docket and be "expedited in every way" (5 U.S.C. 552(a)(4)(D)). In contrast, the Second Circuit noted, "the procedures of section 6(b)(1) consume at least 30 days and probably a much longer period before 'public disclosure' occurs" (585 F.2d at 1388). As the court explained (*ibid.*):

> if the Commission must take "reasonable steps to assure" the accuracy of all information in a record to be disclosed, this would require independent investigation of information received, as here, from another agency some eight years before. Clearly, this would involve long delays inconsistent with the purpose of the FOIA.

In sum, the Second Circuit correctly concluded that the Commission's interpretation of Section 6(b)(1) avoids what would otherwise be inconsistencies and conflicts between the purposes and specific procedures of the Consumer Product Safety Act and the FOIA.

In reaching a contrary result, the Third Circuit relied primarily on the absence of any language in Section 6(b) exempting from that provision disclosures by the Commission pursuant to FOIA requests (App. A, *infra*, 38a). The Third Circuit did not expressly reject many of the factors mentioned by the Second Circuit, but it instead viewed them as insufficiently persuasive to overcome what the court regarded as the plain meaning of the statute. We believe that the Second Circuit has the better of the argument. Whatever the correct resolution, however, the conflict among the circuits and the practical importance of the issue strongly suggest that this case merits the Court's review.[11]

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vestigations made by Commission employees, which reports would include information obtained by the Commission under its statutory authority. Section 29(e) expressly prohibits such other agencies from "disclos[ing] to the public any information contained in a report * * * unless * * * the Commission has complied with the applicable requirements of [Section 6(b)]." The Conference Committee Report makes clear, however, that that restriction, like the restrictions of Section 6(b), do not apply to disclosures pursuant to FOIA requests. Indeed, if the information involved in this case had been given to another federal agency under Section 29(e), the Conference Committee Report makes clear that the other agency would be required to disclose the information to an FOIA requester (subject, of course, to possible FOIA exemptions). In view of this relationship between Section 29(e) and Section 6(b), the Conference Committee Report is probative evidence of the scope of Section 6(b). See *Reiter* v. *Sonotone Corp.*, No. 78-690 (June 11, 1979), slip op. 10 n.7; *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

[11] There is a final consideration that we believe militates in favor of plenary review in this case. The Court has granted certiorari in a closely related case involving the same docu-

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1979

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ments and factual background, *GTE Sylvania, Inc.* v. *Consumers Union of the United States,* No. 78-1248. Although that case, in its present posture, principally raises questions of proper judicial administration, the underlying issue on the merits—whether the television-related accident reports must be disclosed under the FOIA—may ultimately have to be decided in that litigation. Review of both cases would allow the Court to dispose of most of the controversies between all of the interested parties and would ensure that the Commission will not be subjected to directly conflicting orders of different circuits.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1328

GTE SYLVANIA, INCORPORATED

v.

CONSUMER PRODUCT SAFETY COMMISSION, RICHARD O. SIMPSON, BARBARA FRANKLIN, LAWRENCE KUSHNER, CONSTANCE NEWMAN, R. DAVID PITTLE, SADYE DUNN, VINCE DELUISE

(D.C. Civil No. 75-104)

RCA CORPORATION

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION, RICHARD O. SIMPSON, BARBARA H. FRANKLIN, LAWRENCE M. KUSHNER, CONSTANCE E. NEWMAN, R. DAVID PITTLE, SADYE E. DUNN, and VINCE DELUISE

(D.C. Civil No. 75-108)

THE MAGNAVOX COMPANY

v.

RICHARD O. SIMPSON, Chairman, Consumer Product Safety Commission, BARBARA FRANKLIN, Commissioner, Consumer Product Safety Commission, LAWRENCE KUSHNER, Commissioner, Consumer Product Safety Commission, CONSTANCE NEWMAN, Commissioner, Consumer Product Safety Commission, R. DAVID PITTLE, Commissioner, Consumer Product Safety Commission, SADYE DUNN, Secretary, Consumer Product Safety Commission, and VINCE DELUISE, Freedom Information Officer, Consumer Product Safety Commission, and the CONSUMER PRODUCT SAFETY COMMISSION, 1750 K Street, N.W., Washington, D.C. 20207

(D.C. Civil No. 75-112)

ZENITH RADIO CORPORATION

v.

RICHARD O. SIMPSON, Chairman, Consumer Product Safety Commission, BARBARA FRANKLIN, Commissioner, Consumer Product Safety Commission, LAWRENCE KUSHNER, Commissioner, Consumer Product Safety Commission, CONSTANCE NEWMAN, Commissioner, Consumer Product Safety Commission, R. DAVID PITTLE, Commissioner, Consumer Product Safety Commission, SADYE DUNN, Secretary, Consumer Product Safety Commission, and VINCE DELUISE, Freedom Information Officer, Consumer Product Safety Commission, and the CONSUMER PRODUCT SAFETY COMMISSION

(D.C. Civil No. 75-113)

MOTOROLA, INC.

v.

RICHARD O. SIMPSON, BARBARA FRANKLIN, LAWRENCE KUSHNER, CONSTANCE NEWMAN, R. DAVID PITTLE, SADYE DUNN, VINCE DELUISE and CONSUMER PRODUCT SAFETY COMMISSION

(D.C. Civil No. 75-114)

WARWICK ELECTRONICS, INC.

v.

RICHARD O. SIMPSON, BARBARA FRANKLIN, LAWRENCE KUSHNER, CONSTANCE NEWMAN, R. DAVID PITTLE, SADYE DUNN, VINCE DELUISE and CONSUMER PRODUCT SAFETY COMMISSION

(D.C. Civil No. 75-115)

FORD AEROSPACE & COMMUNICATIONS CORPORATION

v.

RICHARD O. SIMPSON, BARBARA FRANKLIN, LAWRENCE KUSHNER, CONSTANCE NEWMAN, R. DAVID PITTLE, SADYE DUNN, VINCE DELUISE and CONSUMER PRODUCT SAFETY COMMISSION

(D.C. Civil No. 75-116)

ADMIRAL CORPORATION, a corporation
600 Grant Street, Pittsburgh, Pennsylvania 15219

v.

UNITED STATES OF AMERICA and CONSUMER PRODUCT SAFETY COMMISSION and Individually the Members Thereof as Individuals and as Members of the Consumer Product Safety Commission, RICHARD SIMPSON, Chairman, DR. LAWRENCE KUSHNER, Vice Chairman, BARBARA HACKMAN FRANKLIN, Commissioner, CONSTANCE E. NEWMAN, Commissioner, DR. R. DAVID PITTLE, Commissioner, SADYE E. DUNN, Secretary

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(D.C. Civil No. 75-131)

GENERAL ELECTRIC COMPANY

v.

RICHARD O. SIMPSON, Chairman, R. DAVID PITTLE, Commissioner, LAWRENCE M. KUSHNER, Commissioner, CONSTANCE E. NEWMAN, Commissioner, BARBARA HACKMAN FRANKLIN, Commissioner, SADYE E. DUNN, Secretary, and CONSUMER PRODUCT SAFETY COMMISSION

(D.C. Civil No. 75-136)

MATSUSHITA ELECTRIC CORPORATION OF AMERICA,
a Corp. of Delaware

v.

CONSUMER PRODUCT SAFETY COMMISSION, SIMPSON, RICHARD O.; FRANKLIN, BARBARA; KUSHNER, LAWRENCE; NEWMAN, CONSTANCE E.; PITTLE, R. DAVID; DUNN, SADYE E.; DELUISE, VINCE

(D.C. Civil No. 75-150)

SHARP ELECTRONICS CORPORATION

v.

UNITED STATES CONSUMER PRODUCTS SAFETY COMMISSION, SIMPSON, RICHARD O.; FRANKLIN, BARBARA H.,; KUSHNER, LAWRENCE M.; NEWMAN, CONSTANCE E.; PITTLE, R. DAVID; DUNN, SADYE E.; DELUISE, VINCE

(D.C. Civil No. 75-151)

TOSHIBA AMERICA, INC.

v.

CONSUMER PRODUCT SAFETY COMMISSION, SIMPSON, RICHARD O.; FRANKLIN, BARBARA; KUSHNER, LAWRENCE; NEWMAN, CONSTANCE E.; PITTLE, R. DAVID; DUNN, SADYE E.; DELUISE, VINCE

(D.C. Civil No. 75-152)

CONSUMER PRODUCTS SAFETY COMMISSION,
APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Argued January 8, 1979

Before SEITZ, *Chief Judge*, GIBBONS and
HIGGINBOTHAM, *Circuit Judges*

(Opinion filed April 30, 1979

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OPINION OF THE COURT

SEITZ, *Chief Judge.*

The Consumer Product Safety Commission (the Commission) appeals from an order of the district court granting the plaintiffs' request for a permanent injunction prohibiting the Commission's disclosure of certain documents obtained under its statutory information-gathering authority. The Commission had earlier made an administrative determination to release the documents to members of the public under the Freedom of Information Act (FOIA),5 U.S.C. § 552. This appeal requires us to resolve the parties' dispute concerning whether the Commission must comply with the information disclosure requirements of the Consumer Product Safety Act (CPSA) when it receives a request for documents under the FOIA.

The plaintiffs are twelve manufacturers of television receivers who brought seperate action against the Commission, which were consolidated in the District of Delaware, to prevent the Commission's disclosure of information concerning television-related accidents which they had submitted pursuant to special order and subpoenas duces tecum issued by the Commission. Amici curiae, the Consumers Union of the United States, Inc. (Consumers Union) and the Public Citizen's Health Research Group (Health Research Group), seek access to that information under the FOIA and have urged this Court to vacate the district court's order for failure of the court and litigants in this action to attempt to join them as parties in compliance with Rule 19 of the Federal Rules of Civil Procedure.

A brief survey of the factual background of this litigation will illuminate the issues joined by the parties and amici. Further factual information may be gleaned from the three published opinions of the district court that form the backdrop to this appeal. *See GTE Sylvania Inc.* v. *Consumer Product Safety Commission,* 443 F.Supp. 1152 (D. Del. 1977) (granting plaintiffs' motion for summary judgment and entering permanent injunction against the Commission); *GTE Sylvania Inc.* v. *Consumer Product Safety Commission,* 438 F. Supp. 208 (D. Del 1977) (denying Commisison's motion to transfer this action to the District Court for the District of Columbia); *GTE Sylvania Inc.* v. *Consumer Product Safety Commission,* 404 F. Supp. 352 (D.Del. 1975) (granting plaintiffs' motion for a preliminary injunction).

I.

Shortly after its creation in 1973, the Commission became concerned about the safety of television sets. That concern led to the publication, on March 22, 1974, of a notice of a proposed hearing concerning potential hazards to the public from the operation of television sets and a request that manufacturers submit all reports on television-related accidents that they had collected since 1969. 39 Fed. Reg. 10,929 (1974). Unsatisfied with the manufacturers' response to this request, the Commission issued special orders on May 13, 1974, pursuant to section 27(b)(1) of the CPSA, 15 U.S.C. § 2076(b)(1), requiring twenty-five television manufacturers to submit the

information previously requested. In the cover letter accompanying the special orders the Commission encouraged compliance by stating that the information would be received in confidence and not made available to the public, at least initially. The Commission, noting the possibility that the submitted information might be the object of FOIA requests, instructed the manufacturers to identify documents claimed to be exempt from public disclosure. Most of the manufacturers followed this suggestion.

Still unsatisfied with the amount of data supplied by the manufacturers, the Commission, on July 26, 1974, issued subpoenas duces tecum to certain manufacturers, including all of the plaintiffs here, ordering each of them to furnish the Commission with "TV-related accident reports." The statutory authority for the issuance of such subpoenas is contained in section 27(b)(3) of the CPSA, 15 U.S.C. § 2076(b)(3).

The district court found, in its opinion granting plaintiffs' request for a preliminary injunction, that the Commission's definition of the data to be submitted was quite broad and was designed to include reports of accidents received by the manufacturers that were incomplete, unverified and even incorrect. Moreover, the court found that the Commission had never clearly defined a "TV-related accident," generating confusion among the manufacturers and causing the Commission itself to recognize that, while some manufacturers had submitted reports pertaining only to accidents caused by fire and electrical

shock, others had included reports of accidents caused by TV tube implosions, carrying handle failures, unstable TV stands, and so forth. Other factors which would render the data collected by the Commission misleading for purposes of safety comparison among sets manufactured by different companies include the Commission's failure to enforce full compliance with the subpoenas and the fact that some manufacturers were, in the Commission's words, "more conscientious than others in maintaining television accident files." *See* 404 F. Supp. at 358-65.

In June, 1974, Consumers Union and the Health Research Group sought access under the FOIA to the accident reports submitted by the manufacturers in response to the Commission's special orders. The Commission considered the requests as applicable as well to information it later received pursuant to the subpoenas duces tecum. The Commission informed the manufacturers of these requests on August 2, 1974, and asked them to substantiate the claims that they had earlier made for exemptions from public disclosure. Meanwhile, the Commission retained a private firm to assist in the processing, analysis and summarization of the submitted accident reports. The information abstracted from each report was computerized and a computer print-out was prepared listing each accident reported by a manufacturer and cataloguing it by type. This print-out does not account in any way for the factors found by the district court to render the data misleading for purposes of comparison. A Commission consultant also prepared

a report summarizing the broad outlines of the data using industry-wide statistics. That report, unlike the print-out, does not identify particular manufacturers or television models, and its disclosure was not enjoined by the district court. *See* 443 F. Supp. at 1163.

After considering the manufacturers' claims of exemption from disclosure under the FOIA, the Commission decided to release to the requesters all of the TV-related accident data it had compiled, including the print-out, except for information identifying accident victims by name and documents subject to the work product doctrine and attorney-client privilege. This decision was based upon a memorandum prepared by the Commission's Office of General Counsel, which concluded that, "The release of the accident data would assist consumers to better evaluate the safety of TVs." The Commission informed the manufacturers of its final decision on April 8, 1975, and noted that the release of the data to the public would be accompanied by a disclaimer stating that "the information could be misleading because some television manufacturers maintained more complete accident records than other manufacturers."

The Commission's decision to release the submitted accident data and reports derived therefrom prompted the plaintiffs to commence suits in various federal judicial districts. After those actions were consolidated in the District of Delaware at the Commission's request and temporary restraining orders prohibiting disclosure were consented to by the Commis-

sion, the district court received briefs and heard oral argument on plaintiffs' request for a preliminary injunction. The plaintiffs contended that the Commission's release of the information submitted by them was barred by exemptions to the FOIA, by 18 U.S.C. § 1905, and by section 6 of the CPSA, 15 U.S.C. § 2055.

The district court held that it had jurisdiction over the subject matter of this suit under 28 U.S.C. § 1337, and that the Commission's decision to release the information requested was a final administrative determination subject to review under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-06. 404 F. Supp. at 365-67. This Court has subsequently agreed that "the APA provides a cause of action for enjoining an agency from disclosing submitter-generated information." *Chrysler Corp.* v. *Schlesinger*, 565 F.2d 1172, 1190 (3d Cir. 1977) (footnote omitted), *aff'd in relevant part sub nom., Chrysler Corp.* v. *Brown*, —— U.S. ——, ——, 47 U.S.L.W. 4434, 4444 (April 18, 1979).[1]

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[1] The Supreme Court's opinion in *Chrysler Corp.* v. *Brown* held that review of an agency decision to disclose data submitted by a private party is available under the APA, at least where an agency disclosure decision is not "committed to agency discretion by law" within the meaning of 5 U.S.C. § 701(a)(2). Just as the Court found that 18 U.S.C. § 1905 placed substantive limits on the agency action challenged in *Chrysler Corp.* v. *Brown*, so too it is obvious that the Commission's disclosure decisions are not committed to agency discretion by law given the limitations on disclosure contained in section 6(b)(1) of the CPSA, 15 U.S.C. § 2055(b)(1). *See* —— U.S. at ——, 47 U.S.L.W. at 4444.

The Court in *Chrysler Corp.* v. *Brown* found jurisdiction to review agency disclosure decisions under the APA under

After reviewing the administrative record, the court determined that the plaintiffs were entitled to a preliminary injunction based, in part, on the reasonable probability of success on the merits of their claim that the Consumer Product Safety Act itself barred the release of the requested information.

Section 6(b)(1) of the CPSA provides that the Commission shall, 30 days prior to the public disclosure of information obtained under the Act identifying individual manufacturers, notify those manufacturers and provide them with a reasonable opportunity to comment upon the information to be disclosed. Furthermore, prior to its public disclosure of information from which the identities of manufacturers may be readily ascertained, the Commission is required to take reasonable steps to assure that the information is accurate and that disclosure is fair in the circumstances and reasonably related to effectuating the purposes of the CPSA.

The district court rejected the Commission's contention that section 6(b)(1) does not apply to the disclosure of information pursuant to an FOIA request, and concluded that that section specifically exempted the requested information from disclosure within the meaning of FOIA Exemption 3, 5 U.S.C. § 552(b)(3). 404 F. Supp. 369-70. Furthermore, the court found that the Commission's release of the

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the general federal question jurisdictiontional grant in 28 U.S.C. § 1331. *Id.* at ——, n.47, 47 U.S.L.W. at 4444, n.47. The district court's determination that subject matter jurisdiction of this suit existed under 28 U.S.C. § 1337 has no effect on this appeal.

TV-related accident data would run afoul of all three of its affirmative obligations under section 6(b)(1) in that the Commission had not taken reasonable steps to assure that the information, from which the identity of the plaintiff manufacturers could be readily ascertained, was accurate, and in that disclosure of the requested information was neither fair in the circumstances nor reasonably related to effectuating the purposes of the CPSA. *Id.* 370-73. Concluding that the plaintiffs had also borne their burden of proof on the other requirements for a preliminary injunction, the district court granted the requested relief. *Id.* 373-75.

In July, 1977, the plaintiffs filed motions to make the preliminary injunction permanent. After the district court had denied the Commission's motion to transfer this litigation to the District of Columbia, where the requesters had commenced an action against the Commission and the manufacturers seeking enforcement of their FOIA request, the court ruled on the parties' cross-motions for summary judgment. Concluding that the Commission had presented no new facts warranting the modification of its earlier findings, and that no changes in the law had affected the validity of the legal reasoning in its earlier opinion, the district court held that the TV-related accident data, other than the consultant's report summarizing industry-wide statistics, was exempt from public disclosure by reason of the Commission's continued failure to comply with section 6(b)(1) of the CPSA. An order enjoining the Commission from

disclosing the data to the public was entered on December 8, 1977. *See* 443 F. Supp. at 1162-63.[2] This appeal followed.

It was the FOIA requests of the Consumers Union and the Health Research Group that prompted the Commission's decision to release the TV-related accident data and, in turn, triggered the manufacturers' decision to commence this litigation. However, in none of the individual actions brought by the manufacturers were the requesters named as parties. Nor have the Commission and the manufacturers made any subsequent effort to add the requesters as parties to this lawsuit. Similarly, up until the filing of this appeal, the requesters have made no move to intervene in this lawsuit. Rather, they chose to file a separate FOIA suit in the District of Columbia on May 5, 1975, joining all of the plaintiffs in this suit and the Commission as defendants.

The progress of the requesters' action in the District of Columbia has been tortuous. The district court dismissed their complaint on September 12, 1975, for failure to present a case or controversy with respect to the Commission and failure to state a claim upon which relief could be granted against the manufacturers. That holding was based on the

[2] We do not read the court's order as enjoining the disclosure of TV-related accident information with respect to which the Commission has complied with the requirements of section 6(b)(1). However, the Commission has not argued before this Court that it has taken, or intends to take, the reasonable steps required by section 6(b)(1) with respect to the material at issue.

fact that the Commission was the only party which could afford the requesters the relief they sought under the FOIA, and that there was complete agreement between the requesters and the Commission on the central question of whether the documents at issue should be released. *Consumers Union of United States, Inc.* v. *Consumers Product Safety Commission*, 400 F. Supp. 848 (D.D.C. 1975). The Court of Appeals reversed the order dismissing the requesters' complaint on July 5, 1977, holding that the parties' dispute over the scope and effect of the preliminary injunction that had been entered by the district court in this case "fully satisfie[d] the Article III case or controversy requirement." *Consumers Union of United States, Inc.* v. *Consumer Products Safety Commission*, 561 F.2d 349, 354 (D.C. Cir. 1977) (footnote omitted). In discussing that dispute, the Court of Appeals incorrectly assumed that the Delaware litigation had run its course without a final adjudication of the issue presented. *Id.* 356. Rehearing was denied in spite of the fact that the manufacturers later moved in this case to make the preliminary injunction permanent. In a per curiam opinion attached to the order denying rehearing the court noted that the requesters were not parties to the Delaware litigation and stated that because all of the necessary parties were present before the district court in the District of Columbia "there appears no reason why the litigation should not proceed here, particularly since this is the venue authorized by the FOIA." 565 F.2d 721, 722 (D.C. Cir. 1977).

While the manufacturers' petition for a writ of certiorari was pending the district court in Delaware entered its order granting their request for a permanent injunction. The Supreme Court granted certiorari, vacated the judgment of the Court of Appeals for the District of Columbia Circuit, and remanded the case "for further consideration in light of the permanent injunction. . . ." *GTE Sylvania, Inc.* v. *Consumers Union of United States, Inc.*, 434 U.S. 1030 (1978). On remand, the Court of Appeals held that the permanent injunction obtained by the manufacturers in this litigation did not bar the requesters from litigating their separate FOIA action. *Consumers Union of United States, Inc.* v. *Consumer Product Safety Commission*, 590 F.2d 1209 (D.C. Cir. 1978), *petition for cert. filed*, 47 U.S.L.W. 3557 (No. 78-1248) (Feb. 19, 1979).

Appearing as amici curiae in this appeal, the requesters argue that the district court erred in failing to require the parties to this lawsuit to join them as defendants pursuant to Rule 19 of the Federal Rules of Civil Procedure. They ask this Court to vacate the judgment below and direct the plaintiffs to attempt to join them as parties defendant. In the event such joinder is found to be impossible because of inability to obtain personal jurisdiction over them or improper venue, they ask us to direct the district court to dismiss this action pursuant to Rule 19(b) or to transfer it to the District of Columbia pursuant to 28 U.S.C. § 1404(a).

Rule 19(a) states:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. . . .

Rule 19(b) states that when a person described in Rule 19(a)(1) or (2) cannot be made a party to an action

> the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Amici's argument in support of their contention that the judgment obtained by the plaintiffs must be vacated have focused, in part, on the impact of Rule 19 on "reverse-FOIA" suits generally. They ask this Court to hold that Rule 19 requires that parties to such suits must join known persons who have requested the material at issue unless those requesters formally notify the district court of their willingness to permit the agency to represent their interests. Amici support a similar rule for FOIA suits in which the plaintiffs know of persons who have submitted the information requested from the agency and who would oppose its release.

The District of Columbia Circuit has suggested, in its most recent examination of the procedural problems manifested in this litigation, that "reverse-FOIA plaintiffs may find that, to prevent judgments in their favor from becoming nugatory, they must join in their lawsuits anyone whose request for information quickened the submitter's controversy with the agency—or perhaps even, by way of a defendant class action, all those who likely may subsequently make such requests." *Consumers Union of United States, Inc., supra,* 590 F.2d at 1220 (footnote omitted). Moreover, the court there concluded that the interests designed to be served by Rule 19 "surely demanded dismissal of the manufacturers' Delaware suit, or at least an injunction shaped to impact to the smallest possible extent upon the absent requesters' interest." *Id.* 1221.

We decline the invitation to attempt at this time to develop a set of general procedural rules governing the effect of non-joinder of requesters, whether known or hypothetical, on a submitter's reverse-FOIA action.[3] We do recognize, in deciding the case before us, however, that the Supreme Court has held that a court of appeals should, on its own initiative, take steps to protect an absent party through consideration of the Rule 19 issue, even when that issue was not presented to the district court nor raised by the parties to the appeal. *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102, 111 (1968).

In addressing the issue raised by amici we will assume that they are parties who, within the terms of Rule 19(a)(2), claim an interest in the subject of this action and who are so situated that the disposition of this action in their absence may impair or impede their ability to protect that interest in the District of Columbia litigation. Furthermore, it is self-evident that the non-joinder of the requesters has left the Commission subject to a substantial risk of incurring inconsistent obligations with respect to the disclosure of the TV-related accident data. Nonetheless, we emphasize that the Supreme Court has

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[3] Congress has recognized the need to limit the amount of litigation arising out a single FOIA request. *See* House Comm. on Government Operations, *Freedom of Information Act Requests for Business Data and Reverse-FOIA Lawsuits.* H.R. Rep. No. 95-1382, 95th Cong., 2d Sess. 64-65, *reprinted in* [1979] U.S. Code Cong. & Ad. News [3], [66-67] (recommending amendment of the FOIA to provide rules governing the venue of reverse-FOIA lawsuits).

made it clear that in deciding the Rule 19 issue when first raised on appeal the reviewing court must consider the fact that a judgment binding on the parties has already been reached after extensive litigation. *See Provident Bank, supra,* 390 U.S. at 109. Viewing the interests served by Rule 19 as they apply to this case "entirely from an appellate perspective," *id.*, we conclude that amici's contention must be rejected.

Here, as in *Provident Bank,* the plaintiffs' interest in having a forum has been greatly enhanced by "a strong additional interest in preserving [their] judgment." *Id.* 110. Were this Court to vacate the permanent injunction entered by the district court solely because of the requesters' non-joinder, that interest would be destroyed. Second, we may assume that consideration of the Commission's interest in avoiding the possibility that the relief granted the manufacturers in this suit will be inconsistent with the judgment eventually entered in the District of Columbia litigation has been foreclosed by the Commission's failure to assert that interest in a timely fashion during the proceedings below. *Id.* Significantly, the Commission has vigorously argued on appeal that equity demands that amici not be permitted to overturn the judgment obtained in the Delaware litigation by raising the Rule 19 issue at this late date.

Although the interest of the amici in the subject matter of this lawsuit is clear, and their joinder as parties in the district court would have been desirable, we also note that they had adequate notice of this action prior to commencing their own lawsuit

and that they could have intervened in the Delaware litigation without significant burden. Amici concede that their decision not to intervene was based on a desire to present their case in a forum that was more convenient and perceived as less hostile to their interests. In *Provident Bank, supra* at 114, the Court reserved decision on the question whether such a purposeful bypass of an adequate opportunity to intervene in pending litigation might estop a non-party from relitigating an issue decided in that case. Here, the District of Columbia Circuit has already ruled that amici will not be so bound by the judgment in this case. Without expressing any view as to the merits of that holding, we conclude that the amici's decision to raise the Rule 19 issue in the Delaware litigation only after the entry of a final judgment by the district court that was adverse to their interests undermines their contention that the parties' noncompliance with Rule 19 compels this Court to vacate that judgment.

Finally, we must consider the interests of the judicial system and the public in the complete, consistent and efficient settlement of controversies. Although ordinarily consideration of that factor would counsel in favor of requiring the joinder of interested parties, *Provident Bank* requires that, when viewed from an appellate perspective, such consideration "include the fact that the time and expense of a trial have already been spent." *Id.* 111.

Thus, even assuming that it may have been appropriate for the district court to have dismissed this

action or transferred it to the District of Columbia upon consideration of the Rule 19 issue prior to its entry of final judgment, we conclude that the interests of all the parties to this suit and the public interest dictate that amici's contention be rejected. The possibility that the district court's order might be modified to accommodate the interests of amici, which we may require as a condition of affirmance under *Provident Bank, supra* at 112, is discussed in Part IV.

III.

In reaching the merits of this appeal, we note at the outset that the Commission does not dispute the accuracy of the district court's factual determinations.[4] The court found that "the information obtained from the plaintiffs which the Commission proposes to release would be misleading to the consumer who attempted to use it for evaluating the relative safety of TV receivers manufactured by the plain-

[4] In *Chrysler Corp.* v. *Brown* the Supreme Court did not reach the question whether Chrysler was entitled to a trial *de novo* on its claim that the agency disclosure at issue exceeded the bounds of statutory authority. —— U.S. at ——, 47 U.S.L.W. at 4444. In this appeal, the Commission has not contended that the district court's review of its determination to release the TV-related accident data to the requesters went beyond the administrative record, nor have the manufacturers contended that *de novo* review was appropriate. Thus, we need express no view on the question whether Commission decisions to disclose information under section 6(b)(1) of the CPSA may be set aside by a reviewing court as "unwarranted by the facts" after a trial *de novo*. *See* 5 U.S.C. § 706(2)(F).

tiffs." 404 F. Supp. at 365. The court also found that the Commission did not take reasonable steps to assure that the information to be disclosed was accurate and that the release of the information "could unjustifiably damage the manufacturers because the data does not form a reliable foundation for safety comparison." *Id.* 372 (footnote omitted). Moreover, at oral argument, the Commission conceded that it could not affirmatively release the material at issue in the form of a press release or Commission report because of its non-compliance with section 6(b)(1) of the CPSA. (Tr. of Oral Argument at 3-4).

The issue raised by the Commission on appeal is that the requirements of section 6(b)(1) are only applicable to the "affirmative disclosure" of information—Commission press releases, publications and the like—and that the district court erred in finding those requirements applicable to the Commission's "passive release" of information pursuant to an FOIA request. The Commission also contends that the district court erred in holding that section 6(b)(1) is a statute exempting material from disclosure within the meaning of Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3).

The Commission is supported in its legal assertions by the Consumer Federation of America, which filed an amicus brief with this Court. Amicus argues that section 6(b)(1) does not meet the definition of a withholding statute in Exemption 3 because its criteria for withholding lack sufficient particularity; the Commission argues that section 6(b)(1) is not a

withholding statute because it does not by its terms exempt materials from disclosure pursuant to the FOIA. Thus, the Commission's argument on the Ex-exemption 3 issue is based solely on its interpretation of the scope of section 6(b)(1) itself.

This Court stated in *Chrysler Corp.* v. *Schlesinger*, *supra*, 565 F.2d at 1192, that in reverse FOIA cases under the APA a reviewing court should first inquire whether any nondisclosure statute or regulation is applicable to the material the agency intends to release. "If so, the court must conclude that the agency has acted outside the scope of its statutory authority and should enjoin disclosure." *Id.* If no nondisclosure statute is found applicable the reviewing court must then determine whether the contested information falls within an FOIA exemption and, if so, whether the agency has considered the proper factors in determining that disclosure was permitted, nonetheless, under its own disclosure regulations. *Id.*

Because the exemptions to the FOIA are permissive rather than mandatory, agencies may establish more liberal disclosure policies than the FOIA requires. *See Chrysler Corp.* v. *Brown*, *supra*, — U.S. at — - —, 47 U.S.L.W. at 4437-38. The Commission has evidently adopted such a policy of liberal disclosure. Of course, the Supreme Court's decision in *Chrysler Corp.* v. *Brown* makes it clear that such a policy will not prevail over a specific statutory command that the information at issue cannot be disclosed. Thus, we first turn to the question whether section 6(b)(1) is a nondisclosure statute that is applicable to the Commission's proposed release of the TV-related accident data.

A.

Section 6(b)(1) provides for a 30 day notice and comment period prior to the Commission's disclosure of information obtained under the CPSA which identifies individual manufactures. It also provides that the Commission shall take reasonable steps prior to such disclosure to assure the accuracy of the information disclosed and that disclosure is fair in the circumstances and reasonably related to effectuating the purposes of the CPSA. If the Commission finds that it has made public disclosure of inaccurate or misleading information reflecting adversely on manufacturers' products or practices, it is required to publish a retraction in a manner similar to that in which disclosure was made.

The FOIA, on the other hand, requires that, upon a request for agency records, the agency shall determine within ten working days whether or not it will comply with that request and immediately notify the requesting party of its determination and reasons therefor, and of his right to appeal an adverse determination to the head of the agency. If an appeal is taken it is to be resolved by the agency within twenty working days. In the presence of certain defined "unusual circumstances" either of these two time limitations may be extended for an additional ten working days upon written notice to the requesting party. 5 U.S.C. § 552(a)(6)(A) & (B). Once the agency determines that it will comply with an FOIA request, actual disclosure is to be prompt. 5 U.S.C. § 552(a)(6)(C).

The Commission, based on its reading of section 6(b)(1) and its legislative history, and noting inconsistencies between the time limitations set forth in that provision and the FOIA, has taken the position throughout this litigation that section 6(b)(1) is inapplicable to the release of information pursuant to an FOIA request. That position has recently been approved by the Court of Appeals for the Second Circuit in *Pierce & Stevens Chemical Corp.* v. *United States Consumer Product Safety Commission*, 585 F.2d 1382 (2d Cir. 1978). In adopting the Commission's interpretation of section 6(b)(1) that court noted that "[t]he questions . . . posed are not easy to resolve," *id.* 1386, but held that the language of the CPSA, contemporaneous and subsequent legislative history, and the inconsistencies between its provisions and those of the FOIA, all led to the conclusion that the public disclosure requirements of the CPSA were not meant to be applied to FOIA requests.

The Commission's position on the issue raised in this appeal has been set forth in proposed rules governing its implementation of section 6(b)(1). *See* 42 Fed. Reg. 54,304 (1977) (to be codified at 16 C.F.R. § 1013). Section 1013.2 of the proposed rules provides that they apply to Commission "publications and publicity pertaining to consumer products . . . created or adopted by a . . . Commission officer or employee for dissemination to the general public or distribution to news media." The Supplementary Information accompanying the proposed rules states that section 1013.2 "expresses the Commission's in-

terpretation that section 6(b) . . . is applicable when the [Commission] actively and publicly discloses information, but not when the [Commission] makes a record available in response to a Freedom of Information Act request. . . ." 42 Fed. Reg. 54,305.

The Commission asks this Court to accept its interpretation of section 6(b)'s scope as one reasonably related to the purposes of the CPSA, and contends that its interpretation is entitled to great weight as the "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion." *See Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). The plaintiffs counter that the Commission's interpretation of section 6(b) is entitled to no deference, characterizing it as an attempt to influence the outcome of this litigation and noting that it "was not sooner made than challenged." *See Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, 156 (1944). Recognizing that we are not here being called upon to review a regulation that has already been promulgated pursuant to the provisions of the APA, we believe that the degree of deference to be afforded the Commission's interpretation of the statute should approximate that which would be afforded an agency's interpretative rule. *Cf. Chrysler Corp.* v. *Brown, supra*, — U.S. at —, 47 U.S.L.W. at 4443 ("We need not decide whether these regulations are properly characterized 'interpretative rules.' It is enough that such regulations are not properly promulgated as substantive rules, and therefore not the product of procedures which Congress prescribed as

necessary prerequisites to giving a regulation the binding effect of law.").

We note that the Supreme Court has recognized that where such important interests as "the public's access to information in the Government's files and concerns about personal privacy and business confidentiality" are in conflict, an agency may reach a conclusion that a different accommodation of those interests is appropriate after interested parties have had notice and an opportunity to comment. *Id.* at —, 47 U.S.L.W. at 4444. Thus, in this situation where the procedures of the APA have not yet been complied with respecting the Commission's proposed rule, we shall give the Commission's interpretation such weight as it is deserving, based on the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . . ." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). We also shall be guided by the Supreme Court's admonition that even the existence of a well-reasoned prior administrative practice of long standing does not relieve a reviewing court of the "responsibility to determine whether that practice is consistent with an agency's statutory authority." *Securities & Exchange Commission* v. *Sloan*, 436 U.S. 103, 118 (1978).

B.

In resolving the Commission's contention that the district court erred in rejecting its interpretation of

section 6(b)(1) we shall look first to the language of the CPSA, then to relevant indicators of legislative intent, and finally to the averred inconsistencies between its requirements and those of the FOIA, Sections 6(a) and (b) of the Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1212 (1972), provide:

> (a)(1) Nothing contained in this chapter shall be deemed to require the release of any information described by subsection (b) of section 552 of Title 5 or which is otherwise protected by law from disclosure to the public.
>
> (2) All information reported to or otherwise obtained by the Commission or its representative under this chapter which information contains or relates to a trade secret or other matter referred to in section 1905 of Title 18 shall be considered confidential and shall not be disclosed, except that such information may be disclosed to other officers or employees concerned with carrying out this chapter or when relevant in any proceeding under this chapter. Nothing in this chapter shall authorize the withholding of information by the Commission or any officer or employee under its control from the duly authorized committees of the Congress.
>
> (b)(1) Except as provided by paragraph (2) of this subsection, not less than 30 days prior to its public disclosure of any information obtained under this chapter, or to be disclosed to the public in connection therewith (unless the Commission finds out that the public health and safety requires a lesser period of notice), the Commission shall, to the extent practicable, notify, and

provide a summary of the information to, each manufacturer or private labeler of any consumer product to which such information pertains, if the manner in which such consumer product is to be designated or described in such information will permit the public to ascertain readily the identity of such manufacturer or private labeler, and shall provide such manufacturer or private labeler with a reasonable opportunity to submit comments to the Commission in regard to such information. The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this chapter. If the Commission finds that, in the administration of this chapter, it has made public disclosure of inaccurate or misleading information which reflects adversely upon the safety of any consumer product, or the practices of any manufacturer, private labeler, distributor, or retailer of consumer products, it shall, in a manner similar to that in which such disclosure was made, publish a retraction of such inaccurate or misleading information.

(2) Paragraph (1) (except for the last sentence thereof) shall not apply to the public disclosure of (A) information about any consumer product with respect to which product the Commission has filed an action under section 2061 of this title (relating to imminently hazardous products), or which the Commission has reasonable cause to believe is in violation of section

2068 of this title (relating to prohibited acts), or (B) information in the course of or concerning any administrative or judicial proceeding under this chapter.

15 U.S.C. §§ 2055(a) & (b).

The language of section 6 reveals that the Congress which enacted it was aware of the likelihood that the Commission would be called upon to release documents under the FOIA which it had obtained pursuant to its broad information-gathering authority. Thus, section 6(a)(1) reaffirms that the Commission is not required to release information that is within the exemptions to the FOIA, 5 U.S.C. § 552(b). Section 6(a)(2) creates an absolute prohibition on the Commission's release, by any means, of trade secrets and other information protected by 18 U.S.C. § 1905.

The Commission concedes that the scope of section 6(a) includes FOIA requests, but argues that section 6(b) is applicable only to the public disclosure of information initiated by the Commission. The Second Circuit opinion in *Pierce & Stevens* also adopted this position.

> Section 6(a) of the Consumer Product Safety Act specifically incorporates the nine exemptions of the FOIA by reference, and repeats the flat prohibition on disclosing trade secrets and other confidential commercial matter. We believe that in this statute affecting only commercial enterprises, Congress did not intend to reduce disclosure called for by the FOIA when a person requests documents, but to leave that situation unchanged. On this view, section 6(a) incorporates

> the FOIA exemptions with understandable emphasis, in this commercial setting, on absolute protection for trade secrets and similar information, and section 6(b)(1) provides a unique procedure to deal with the problem of unfairness which may occur when a government agency focuses adverse publicity on a particular business enterprise.

585 F.2d at 1388. Our examination of the statute and its legislative history will focus, then, on indicia of congressional intent to make this distinction between the scope of sections 6(a) and 6(b).

The Commission argues, in reading section 6(b)(1) itself, that Congress, in using the term "public disclosure" implied that the provisions contained therein were not designed to limit the Commission's authority to simply release information to members of the public upon request. The Second Circuit opinion draws a similar inference from the language of the section. *See Pierce & Stevens, supra*, 585 F.2d at 1387. Both sections 6(a) and 6(b), however, are included in a single provision entitled "Public disclosure of information." Thus, we view the semantic distinction as unpersuasive. Furthermore, we would hesitate to ascribe to Congress a belief that "public disclosure" would be plainly understood by those called upon to interpret the CPSA as not encompassing disclosure to members of the public through the FOIA.

The Commission also relies upon the retraction provisions of section 6(b)(1) as textual support for its interpretation of the section's scope. Thus, it argues

that it makes no sense for the Commission to be required to publish a retraction of inaccurate or misleading information in a manner similar to that in which disclosure was made when the method of disclosure was mere compliance with an FOIA request. The Second Circuit opinion also relied on the retraction provision as evidence that section 6(b)(1) was directed toward agency-initiated publicity. *See Pierce & Stevens, supra* at 1387. We believe, however, that where the Commission had released information under the FOIA that it later learned was inaccurate and which reflected adversely upon identifiable manufacturers it conceivably could "publish a retraction" in a similar manner by releasing correcting information to the same FOIA requesters who had received the earlier inaccurate material. Thus, the retraction provision, on its face, is not persuasive evidence of congressional intent to limit section 6(b)(1) to disclosure initiated by the Commission.

In a related vein, the Commission argues that section 6(b)(1) requires it to take reasonable steps to assure the accuracy of information to be disclosed, steps which might include rewriting a document, while the FOIA does not contemplate such review and rewriting but only the disclosure of existing documents. *Accord Pierce & Stevens, supra* at 1388. However, if the specific requirements of section 6(b)(1) apply to disclosure made in compliance with FOIA requests, the Commission may find, after taking reasonable steps to assure accuracy and fairness, that existing documents cannot be released in any

form. The appropriate posture of the Commission in such cases would be to deny the request for the inaccurate material. If the Commission chose, as a matter of policy, to comply as best it was able with such a request, section 6(b)(1) could be accommodated by releasing the information in an accurate and fair form in a newly-created document. Thus, the reasonable steps requirement of section 6(b)(1) also does not evidence a congressional intent to limit its scope to affirmative disclosure by the Commission.

Most significantly, from our viewpoint, section 6(b) contains specific exceptions to its requirements in section 6(b)(2). The list of those exceptions does not include the release of information pursuant to the FOIA. We believe that it is reasonable to assume that if Congress intended to make the distinction between the scope of sections 6(a) and (b) that the Commission argues for here, it would have done so explicitly in section 6(b)(2).

In reviewing the language of section 6(b)(1) within the total context of the CPSA we note that section 25(c), 15 U.S.C. § 2074(c), states that certain information generated by the Commission shall be made available to the public subject to the requirements of sections 6(a)(2) and 6(b), "but notwithstanding" the provisions of section 6(a)(1). Section 25(c) designates accident and investigation reports which do not identify injured parties and their physicians, and reports on research and demonstration projects as "public information," notwithstanding the fact that they might be exempted from

disclosure underthe FOIA. But the Commission must determine that those reports do not contain trade secrets protected by 18 U.S.C. § 1905 (incorporated by reference in section 6(a)(2)) and must comply with section 6(b) prior to making the reports public. Thus, section 25(c) makes section 6(b) applicable to at least some information obtained or generated by the Commission, the disclosure of which could be requested under the FOIA.

The only other reference to section 6(b) within the other provisions of the CPSA is contained in section 29(e), 15 U.S.C. § 2078(e). Section 29, entitled "Cooperation with States and other Federal agencies," was amended by the Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, § 15, 90 Stat. 510, to include a new subsection governing the public disclosure of information received from the Commission by other agencies engaged in activities relating to health, safety or consumer protection. New section 29(e) provides, in pertinent part, that no such agency

> may disclose to the public any information contained in a report received by the agency or authority under this subsection unless with respect to such information the Commission has complied with the applicable requirements of section [6(b)].

15 U.S.C. § 2078(e). On its face, section 29(e) adds no weight to the Commission's interpretation of the scope of section 6(b)(1). However, in the Conference Report accompanying the Improvements Act, the conferees stated:

> The requirement that the Commission comply with section 6(b) prior to another Federal agency's public disclosure of information obtained under the Act is not intended by the conferees to supersede or conflict with the requirements of the Freedom of Information Act (5 U.S.C. 552 (a)(3) and (a)(6)). *The former relates to public disclosure initiated by the Federal agency while the latter relates to disclosure initiated by a specific request from a member of the public under the Freedom of Information Act.*

H.R. Conf. Rep. No. 94-1022, 94th Cong., 2d Sess. 27 [hereinafter *Improvements Act Conference Report*], *reprinted in* [1976] U.S. Code Cong. & Ad. News 1017, 1029 (emphasis supplied). Not surprisingly, the Second Circuit afforded this passage some weight in affirming the Commission's interpretation of the scope of section 6(b)(1). *See Pierce & Stevens*, *supra* at 1387 & n.23. Our evaluation of the effect of the intent of the conferees in adding section 29(e) to the CPSA on the interpretation to be given section 6(b)(1) is treated below.

In sum, the terms of the statute itself suggest that Congress was aware of the interplay between the public information provisions of the Consumer Product Safety Act and the FOIA. Section 6, viewed as a whole, applies to both Commission-initiated disclosure and the release of information pursuant to the FOIA. While the Commission argues that section 6(b)(1) was only meant to apply to the former methods of disclosure, Congress did not include the disclosure of information pursuant to an FOIA request among the exceptions to the requirements of that section. We are not persuaded that the language of section 6(b)(1), its requirement that the Commission take reasonable steps to assure the accuracy of disclosed information, and its retraction provisions, rebut the resulting inference that Congress intended section 6(b)(1) to apply to all forms of disclosure by the Commission. To the contrary, the Congress that enacted section 6(b)(1) also enacted section 25(c), which in our view, clearly implies that the former provision is applicable to some types of information obtained or generated by the Commission, whether it is to be "affirmatively released" or released to FOIA requesters. The language of the statute is, of course, not conclusive in resolving this issue. Thus, we must turn to the Act's legislative history, and an analysis of subsequent legislative events cited by the Commission, as aids to divining congressional intent.

C.

The origins of the provisions of section 6 of the CPSA, as finally enacted, are traceable to H.R. 8110, a bill introduced in the House on behalf of the Administration. The conference committee which approved the final version of the Act noted that its provisions governing information disclosure were drawn from the House bill, H.R. 15003. *See* H.R. Conf. Rep. No. 92-1593, 92d Cong., 2d Sess. 41 [hereinafter *Conference Report*], *reprinted in* [1972] U.S. Code Cong. & Ad. News 4596, 4633. Section 6 of H.R. 1503, as passed by the House on Septem-

ber 20, 1972, was identical in all significant respects to section 6 as it was enacted. *See* 118 Cong. Rec. 31,411 (1972). Furthermore, section 6 of H.R. 15003, as passed by the House, was identical, in all respects significant to this case, to the version of the bill that was reported out of the House Committee on Interstate and Foreign Commerce on June 20, 1972. *See* H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. 5 (1972) [hereinafter *House Report*]. However, the hearings before the Subcommittee on Commerce and Finance which preceded the full committee's favorable report on H.R. 15003 reveal that two significantly different versions of what eventually became section 6 were considered by the committee. *See Consumer Product Safety Act: Hearings Before the Subcomm. on Commerce and Finance of the Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st & 2d Sess. (1971-72) [hereinafter *Subcommittee Hearings*].

The Subcommittee on Commerce and Finance considered two basic versions of proposed legislation on consumer product safety. One version, supported by the Administration, would have created a consumer product safety program within the Department of Health, Education and Welfare (HEW). The second version, typified by H.R. 8157, introduced by Representative Moss of California, was modeled on legislation that had been proposed by the National Commission on Product Safety and recommended the creation of an independent regulatory commission having authority in the field of consumer product safety.

Although most of the debate at the hearings, and later within committee, focused on this major difference between the two bills, some attention was also focused on the differences between the provisions governing information disclosure.

The Administration bill, H.R. 8110, contained a provision nearly identical to section 6 as it was eventually enacted. Section 4(c) of H.R. 8110 provides:

> (1) Nothing contained in this Act shall be deemed to require the release of any information described by subsection (b) of section 552, title 5, United States Code, or which is otherwise protected by law from disclosure to the public. The Secretary shall not make public information obtained by him under this Act which would disclose trade secrets, formulas, processes, costs, methods of doing business, or other competitive information not otherwise available to the general public; or the names or other means of identification of ill or injured persons without their express written consent.
>
> (2)(A) Except as provided by subparagraph (B) of this paragraph, not less than thirty days prior to his public disclosure of any information obtained under this Act, or to be disclosed to the public in connection therewith, the Secretary shall provide such information to each manufacturer of any consumer product to which such information pertains, if the manner in which such consumer product is to be designated or described in such information will permit the public to ascertain readily the identity of such manufacturer, and shall provide such manufacturer with a reasonable opportunity to submit comments to

the Secretary in regard to such information. Upon the request of such manufacturer, the Secretary shall publish such comments or a fair summary thereof, or a statement of the manufacturer of reasonable length in lieu thereof, concurrently and in association with the disclosure of the information to which such comments or statement appertain. The Secretary shall take reasonable steps to assure, prior to his public disclosure thereof, that information from which the identity of such manufacturer may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this Act. If the Secretary finds that, in the administration of this Act, he has made public disclosure of inaccurate or misleading information which reflects adversely upon the safety of any consumer product, or the practices of any manufacturer of, distributor of, importer of, or dealer in consumer products, he shall, in a manner similar to that in which such disclosure was made, publish a retraction of such inaccurate or misleading information.

(B) Subparagraph (A) (except for the last sentence thereof) shall not apply to the public disclosure of (i) information about any consumer product with respect to which product the Attorney General has filed an action (or an action against a manufacturer thereof with respect to such product) under section 12, or which the Secretary has reasonable cause to believe is in violation of section 15, or (ii) information about any administrative or judicial proceeding under this Act.

Reprinted in Subcommittee Hearings, supra at 7-9. An examination of the foregoing provision reveals that the operative information disclosure requirements of H.R. 8110, absent the requirement that the Commission publish manufacturers' comments, were enacted into law in section 6(b). On the other hand, the information disclosure provisions in the Moss bill were far less restrictive. Section 19(d) of H.R. 8157 simply provided:

> When the Commission finds that publication of any information obtained by it is in the public interest and would not give an unfair competitive advantage to any person, it is authorized to publish such information in the form and manner deemed best adapted for public use, except that data and information which relates to a trade secret, shall be held confidential and shall not be disclosed, unless the Commission determines that it is necessary to carry out the purposes of the Act.

Reprinted in Subcommittee Hearings, supra at 68-69. At the opening of the hearings, Representative Moss, Subcommittee Chairman, listed the information disclosure provisions of the two bills among the significant differences to be explored by the subcommittee. Moreover, in commenting upon those provisions of H.R. 8110 that would later be enacted in section 6(a)(2) of the CPSA, he stated that "I am sure the subcommittee will want to examine carefully this proposed change in the Freedom of Information Act." *Id.* 300.

Many of the witnesses who testified before the subcommittee commented on the differences between the two versions of the proposed legislation respecting the Commission's (or Secretary's) authority to disseminate information to the public. Contrary to the Commission's contention here, however, we do not find those comments to support the view that manufacturers feared the impact of adverse publicity when generated by a government agency, to the exclusion of a more general apprehension about the disclosure of misleading or inaccurate information. Thus, while the prepared statement of James F. Young, Vice President of General Electric Company, included an admonition that the public dissemination of premature, inaccurate or misleading information, "[i]ssued under the dignity and with the apparent imprimatur of the U.S. Government," could have serious impacts upon reputation, good will and the product market, *id.* 1065, others who spoke in behalf of H.R. 8110 favored its disclosure provisions on more general grounds. For example, Bernard H. Falk, President of the National Electrical Manufacturers Association, stated that "[n]o information should be disclosed which is inaccurate, misleading or incomplete." *Id.* at 1197. The prepared statement of George P. Lamb, General Counsel for the Association of Home Appliance Manufacturers, included this passage:

> Authority to collect and disseminate information carries with it a responsibility not to disclose data that may injure a company or reveal confidential information. A statute establishing a standards-setting agency should state explicitly, as do many other federal statutes, that confidential data are not to be disseminated. A statute should also assure that any information to be made public is accurate, and that if it is derogatory the company it identifies has had an opportunity to refute it. H.R. 8110 contains provisions in § 4(c) that would accomplish this.

Id. 1237.

Moreover, we believe that the most authoritative reading of the intended scope of section 4(c) of the Administration's bill is that provided to the subcommittee by HEW, the agency which drafted H.R. 8110. In HEW's section-by-section analysis of the bill, it stated:

> *Section 4(c)* would protect the Secretary's refusal to disclose information not required to be released by the [FOIA], and would expressly prohibit his disclosure of commercial secrets, or of illness or injury data revealing [the] identity of the victim.
>
> It would also require the provision of thirty days notice to the manufacturer of any consumer product prior to the Secretary's public disclosure of information respecting that product, if such information would reveal the manufacturer's identity. . . .

Id. 188. Clearly, the Commission's argument that section 6(b)(1)'s particular requirements were intended to be applicable only to Commission-initiated information disclosure is not borne out by HEW's

analysis of section 4(c). Section 4(c), like section 6 of the CPSA as enacted, covers both the affirmative disclosure of information to the public in the form of press releases and the like, and the release of information under the FOIA. Yet there is no indication in the passage quoted above supporting the Commission's view that the particular requirements of section 4(c)(2) (which was to become section 6(b)(1)) were intended to be read as applicable only to the former methods of information disclosure. Rather, HEW's analysis made no distinction between the methods of information disclosure that were to be covered by sections 4(c)(1) and 4(c)(2).

The Commission's assertion that Congress intended section 6(b)(1) to be applied only to affirmative methods of disclosure because those methods entail the possibility of enhanced harm to manufacturers' reputations that would result from the public dissemination of adverse information carrying the imprimatur of government, is likewise unsupported by committee reports and the House debates on the CPSA. The House Committee on Interstate and Foreign Commerce, in incorporating the provisions of section 4(c) of the Administration bill into H.R. 15003, made no distinction between those aspects of section 6 expressly governing FOIA requests and the provisions of section 6(b)(1). Rather, the Committee analyzed the information disclosure provisions of the proposed act as follows:

> If the Commission is to act responsibly and with adequate basis, it must have complete and

full access to information relevant to its statutory responsibilities. Accordingly, the committee has built into this bill broad information-gathering powers. It recognizes that in so doing it has recommended giving the Commission the means of gaining access to a great deal of information which would not otherwise be available to the public or to Government. Much of this relates to trade secrets or other sensitive cost and competitive information. Accordingly, the committee has written into section 6 of the bill detailed requirements and limitations relating to the Commission's authority to disclose information which it acquires in the conduct of its responsibilities under this act.

Subsection (a) makes clear that nothing in this act shall be deemed to compel the Commission to disclose information which would not otherwise be available to the public under the Freedom of Information Act (5 U.S.C. 552(b)). There is one exception to this requirement. The Freedom of Information Act would not require a Federal agency to permit public access to investigatory files compiled for law enforcement purposes. Section 25(c) of this bill qualifies the Commission's authority to deny access to investigatory files by making accident investigations specifically available to the public so long as they do not identify injured parties or attending physicians (unless a release is obtained from such persons).

Subsection (a)(2) contains an absolute prohibition against the Commission's disclosure of trade secrets and other information referred to in section 1905 of title 18—except to other offi-

cers or employees concerned with carrying out responsibilities under this act or when relevant in any proceeding under this act. . . .

Before disseminating any information which identifies the manufacturer or private labeler of a product, the Commission is directed to give the manufacturer or private labeler 30 days in which to comment on the proposed disclosure of information. This procedure is intended to permit the manufacturer or private labeler an opportunity to come forward with explanatory data or other revelant information for the Commission's consideration. Theer is no intention that the Commission be required to include a manufacturer's or private labeler's explanation in the materials which it determines to disseminate at the end of the 30-day period. This was suggested to the committee and rejected.

The committee recognizes that the Commission has a responsibility to assure that the information which it disseminates is truthful and accurate. Where it is discovered that the disclosure of information has been inaccurate or misleading and reflects adversely on the safety of a consumer product or the practices of any manufacturer, distributor, or retailer of the product, the Commission is directed to publish a retraction in a manner similar to that in which the original disclosure was made. . . .

House Report, supra at 31-32. Throughout this passage the committee spoke of requirements and limitations relating to the Commission's disclosure and dissemination of information acquired in the course of conducting its statutory responsibilities. Some of

those requirements and limitations expressly clarify the Commission's authority to disclose information under the FOIA. There is no indication in the committee report that the requirement of 30 day notice "before disseminating any information" and the requirement that the information which the Commission "disseminates is truthful and accurate" were not also meant to apply to the "disclosure" of information under the FOIA.

The Commission places great reliance on the debates on section 6 which took place on the floor of the House as support for its assertion that the purpose of section 6(b)(1) was to prevent the injury to a manufacturer's reputation that could only arise from adverse publicity initiated and approved by the government. A fair reading of those debates, however, does not support the Commission's contention. Representative Moss, speaking in support of H.R. 15003, described it as "contain[ing] careful provisions protecting against the unnecessary disclosure of trade secrets and other confidential information," an element of the proposed legislation making it clear that it "will be fair to business." 118 Cong. Rec. 31,378 (1972). Representative Broyhill, of North Carolina, who along with Moss had served on the subcommittee that had conducted hearings on the bill, also spoke in its support. He stated that the bill required the Commission "to notify each manufacturer of its *intent to release any information* at least 30 days prior to disclosure and after an opportunity for comment." 118 Cong. Rec. 31,381 (1972) (emphasis supplied).

These statements by the bill's proponents certainly do not support the Commission's view that Congress meant to distinguish affirmative disclosure from the mere passive release of information pursuant to the FOIA.

The remarks of Representative Crane of Illinois concerning the evils of government-initiated adverse publicity lend little credence to the Commission's interpretation. Representative Crane spoke *against* the bill's passage, stating that "the creation of a Consumer Product Safety Commission, is an intrinsic part of the growing attack upon private business, and the effort to place business under the control of a huge new Government bureaucracy." 118 Cong. Rec. 31,389 (1972). As an example of the injuries that Government regulation had inflicted upon the nation's economy in the past he cited the financial damage incurred by the DuPont Company when the Federal Trade Commission publicly charged, without basis, that the Company had engaged in false advertising. The fact that Crane, an opponent of the CPSA, saw the potential in it for similar events to occur in the Commission's regulation of consumer products, *in spite of the protective provisions of section 6(b)(1)*, provides no inkling of support for the Commission's view that that section is limited to the affirmative disclosure of information.

When the conference committee resolved the differences between the versions of the CPSA that had been passed by the House and Senate, it incorporated the House provisions respecting information dis-

closure. The conferees' description of section 6(b)(1) is instructive in that the accuracy and fairness requirements for "publicly disclosed information" are mentioned in almost the same breath has the description of section 6(a)(1), stating that no information need be "publicly disclosed" by the Commission if it is exempt from disclosure under the FOIA:

> The Commission was directed to take steps to assure that publicly disclosed information from which specific manufacturers or distributors could be identified was accurate and that the disclosure was fair in the circumstances and reasonably related to carrying out its duties. No information would be required to be publicly disclosed if it is information described in section 552(b), title 5, United States Code (relating to information whicl is entitled to be protected from public access under the Freedom of Information Act), or which is otherwise protected by law from disclosure to the public.

Conference Report, supra at 40-41, *reprinted in* [1972] U.S. Code Cong. & Ad. News 4596, 4633.

We conclude that the only reasonable inference that can be drawn from the legislative history of section 6(b)(1) is that the members of the Administration who introduced it, the legislators who drafted it, reported it favorably for consideration by the House and then spoke in favor of its enactment, and the conferees who incorporated it into the final legislative product, did not intend that its protections from the misleading, inaccurate and unfair public dissemination of information were to be applied only

to what the Commission refers to as affirmative disclosures. There is not an inkling of support in the legislative history for the distinction the Commission has attempted to make between the scope of section 6(a) and that of section 6(b). The legislative history of the CPSA thus reinforces the inference that we drew from the language of the statute itself. We turn then to the Commission's argument that two subsequent events have demonstrated the reasonableness of its interpretation of section 6(b)(1).

The more significant of those events was the statement by the conferees on the Consumer Product Safety Commission Improvements Act of 1976 in adopting new section 29(e) of the Act. *See* page 33 supra. The provisions of section 6(b) were incorporated by reference in section 29(e) and the conferees stated that such incorporation was "not intended . . . to supersede or conflict with the requirements of the [FOIA]." Adopting the view of section 6(b)(1) pressed by the Commission here, the conferees went on to state that that section "relates to public disclosure initiated by the Federal agency while the [FOIA] relates to disclosure initiated by a specific request from a member of the public . . . ." *Improvements Act Conference Report, supra* at 27, *reprinted in* [1976] U.S. Code Cong. & Ad. News 1017, 1029.

In construing the effect of the latter statement on the statutory authority of the Commission to construe section 6(b)(1) as inapplicable to the release of information pursuant to an FOIA request we are

reminded that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 P.S. 304, 313 (1960), *quoted in United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348-49 (1963). The Commission contends that this is an appropriate occasion for the invocation of the equally venerable, if somewhat inconsistent, maxim which holds that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 380-81 (1969) (footnote omitted). Of course, in this case the Commission is not relying on subsequent legislation as a declaration of Congress's earlier intent in enacting section 6(b)(1), but rather relies on a statement of the conference committee which approved that legislation. Without resolving the dispute as to which of the two maxims is more applicable in such situations generally, we believe that an examination of the statement of the conference committee, in its legislative context, reveals that it does form a hazardous basis for construing congressional intent in enacting section 6(b)(1).

First, we reiterate that section 29(e), by its terms, does not interpret the scope of section 6(b). Second, the conference committee statement was made in the context of approving legislation that contained numerous and extensive amendments to the Consumer Product Safety Act; yet the problem before us here was not otherwise addressed by Congress in enacting

the Improvements Act. The interpretation of section 6(b) espoused by the conferees was not mentioned by the House committee that drafted the Improvements Act. *See* H.R. Rep. No. 94-325, 94th Cong., 1st Sess. 18 (1975). The Senate version of the Improvements Act did not contain a provision amending section 29. *Improvements Act Conference Report*, *supra* at 26, *reprinted in* [1976] U.S. Code Cong. & Ad. News 1017, 1028. In the debates in the House the amendment to section 29, and the relationship between section 6(b) and the FOIA, were not mentioned. Nor was the conferees' interpretation of section 6(b) mentioned in either House when the conference report was debated. *See* 122 Cong. Rec. 10,811 (House approval of the conference report); *id.* 11,585 (Senate approval) (1976). Given our view that the legislative history of section 6(b)(1) itself strongly supports an inference that the Commission's interpretation of that provision conflicts with the intent of the Congress that enacted it, we are unwilling to accept the isolated, and in our view erroneous, conclusion of a later congressional committee as persuasive authority to the contrary.

The Commission argues that the conference report is certainly authoritative as to Congress's intent with respect to section 29(e) itself and suggests that it would be anomalous for the provisions of section 6(b)(1) to be applicable to FOIA requests for information from the Commission itself but inapplicable to FOIA requests for information that had been obtained by other federal agencies from the Commis-

sion. The scope of section 29(e) is not before us in this litigation, so we need express no view as to the validity of the conferees' suggestion with respect to its proper interpretation. In addressing ourselves to the asserted anomaly, however, we note that section 25(c) of the CPSA, by its terms, applies the requirements of section 6(b)(1) to FOIA requests for accident investigation reports. It would be equally anomalous for section 6(b)(1) to be applicable to the release of some categories of Commission documents requested under the FOIA but not others, when nothing in the language or history of either section 6(b)(1) or section 25(c) contemplates such a distinction.

The second item of subsequent legislative history relied upon by the Commission is an exchange that took place between Richard O. Simpson, Chairman of the Commission, and Representative Moss during an oversight hearing on regulatory reform. During that hearing Chairman Simpson reported that the Commission had adopted "an extremely liberal interpretation" of the FOIA, one requiring release of all requested material, notwithstanding the availability of exemptions granting the Commission the discretion to deny a request. He went on to note the issue raised in this lawsuit, and stated: "The Commission has been dealing with this problem by interpreting section 6(b) as applying only to affirmative disclosures by the Commission, and the Freedom of Information Act as applying to passive release of information." In response, Representative Moss replied: "As the primary author of both acts, I am

inclined to agree with you." *Regulatory Reform: Hearings Before the Subcomm. on Oversight and Investigation of the Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. Vol. IV, 7-8 (1976) [hereinafter *Oversight Hearings*].

It goes without saying that the views of a single member of Congress concerning the appropriate interpretation of a statutory provision passed some years ago earlier are not dispositive. As the Supreme Court only recently stated in *Chrysler Corp.* v. *Brown, supra*, — U.S. at —, 47 U.S.L.W. at 4442, "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." And notwithstanding Representative Moss' claimed authorship of the CPSA generally, it should be recognized that he was not a sponsor of the bill that provided that legislation with its provisions governing information disclosure. *See* pages 35-38 *supra*. Moreover, Chairman Simpson submitted to the oversight subcommittee a proposed amendment to section 6(b)(2) that would have added the release of information by the Commission under the FOIA to the list of exceptions from the requirements of section 6(b)(1). *Oversight Hearings*, *supra* at 8. That proposed amendment has never been reported out of committee.

Our analysis of the language and legislative history of section 6(b)(1) leads us to conclude that Congress did not intend that provision to apply only to Commission press releases, news conferences, publication of reports and other forms of "affirmative

disclosure" of information obtained under the Act. Rather, our analysis leads to the conclusion that the information disclosure requirements of the CPSA were meant to protect manufacturers from the harmful effects of inaccurate or misleading public disclosure by the Commission, through any means, of material obtained pursuant to its broad information-gathering powers. The policies designed to be served by section 6(b)(1) would be severely undermined, if not eviscerated, were the Commission's interpretation to prevail. As noted by the House Committee which drafted section 6 of the Act, the Commission was given broad information-gathering authority, giving it the means of gaining access to information not otherwise available to the public or the government. Section 6(b)(1) was designed to insure that the Commission's authority to release such information would be limited, and that its responsibility to assure that information disseminated to the public be both accurate and fairly presented would be recognized.

The Commission argues that the interpretation of section 6(b)(1) which we have reached here, at least tentatively, renders that section inconsistent with the scheme of the FOIA, and that to carry out the intentions of both statutes we must adopt its interpretation of section 6(b)(1). The Court of Appeals for the Second Circuit has agreed that the adoption of the Commission's interpretation of section 6(b)(1) has the salutary effect of avoiding a potential conflict between the CPSA and the FOIA. *See Pierce*

& Stevens, supra at 1388.* However, the Court of Appeals reached its conclusion that such a potential conflict exists without analyzing the effect that a holding that section 6(b)(1) is a withholding statute within Exemption 3 of the FOIA might have on the apparent inconsistencies between the two statutes. *Id.* 1389.

D.

The Commission notes that the FOIA requires that it determine within ten working days whether or not it will comply with a request for documents within its files, and to thereafter make prompt disclosure to the requesting party. *See* 5 U.S.C. §§ 552(a)(6)(A) & (C). It contends that compliance with those requirements would be rendered impossible if it must apply the requirements of section 6(b)(1) to any request for information that would identify an individual manufacturer. First, 30 days notice would have to be given the manufacturer prior to compliance with the FOIA request; second, the Commission would have to take reasonable steps to assure that the information contained in the requested documents was accurate, and that its release would be fair and consistent with the legislative purposes of the CPSA. The Commission argues that the long delays that would, in all probability, accompany compliance with section 6(b)(1) would defeat the intent of the FOIA.

This argument assumes that the Commission would be required to comply with the time limitations of the FOIA in spite of the independent requirements of

section 6(b)(1). However, federal agencies have the discretion to refuse FOIA requests if the requested material falls within one of the nine statutory exemtions set forth in 5 U.S.C. § 552(b). Exemption 3 of the FOIA, which the district court held was applicable to the material requested here, provides that the FOIA does not apply to matters that are

> specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld . . . .

5 U.S.C. § 552(b)(3). If the district court was correct in its conclusion that section 6(b)(1) is a withholding statute within Exemption 3 and that the requested material was covered by that statute, then the asserted inconsistencies between the provisions of section 6(b)(1) and the requirements of the FOIA may be rendered less telling. For example, if the Commission were to receive an FOIA request for material that it had gathered in such a fashion that its release would be obviously unfair, or if the material obviously portrayed a factual situation inaccurately, the Commission would have no difficulty in immediately informing the requester that the material was exempt from disclosure under Exemption 3. If the Commission had doubts about the accuracy of the material requested, or the fairness of its dis-

closure, and was unable to take reasonable steps to remedy the situation within 10 working days it might inform the requester that release of the information would be denied pending compliance with the terms of section 6(b)(1). In either event, the Commission's determination that the requested material was in fact exempted from disclosure by Exemption 3's incorporation of section 6(b)(1) would be subject to timely appeal to the agency head and to the district court. On the other hand, if the Commission determined that the material requested was accurate, and that disclosure would be fair under the circumstances and would effectuate the statutory purposes, it could inform the requester that release would be forthcoming pending 30 days notice to the manufacturers identified in that material. The 30 day notice and comment period prior to actual disclosure is not irreconcilable with the requirement of the FOIA that "[u]pon any determination by an agency to comply with a request for records, the records shall be made *promptly available* to such person making such request." 5 U.S.C. § 552(a)(6)(C) (emphasis supplied).

Such inconsistencies as exist between the two statutes are not unsual or uncontemplated by Congress. By the very fact that Exemption 3 incorporates specific nondisclosure statutes into the general scheme of the FOIA, inconsistencies will arise as agencies attempt to comply with those specific statutes while processing FOIA requests. Exemption 3 was designed to provide the agencies with the flexibility needed to accommodate those inconsistencies.

We conclude that the perceived inconsistencies between section 6(b)(1) and the FOIA will be minimized if the former provision is, in fact, a withholding statute within the meaning of Exemption 3, granting the Commission the discretion not to disclose material subject to its provisions. Furthermore, if the Commission were to abuse that discretion in a particular case, either by refusing to disclose material not covered by section 6(b)(1) or by disclosing material without complying with its provisions, the injured party will have access to the courts to review the Commission's determination.

The district court found that section 6(b)(1), in requiring the Commission to take reasonable steps to assure accuracy, fairness, and the service of a statutory purpose prior to disclosing information identifying individual manufacturers, established particular criteria for withholding within the meaning of Exemption 3. *See* 443 F. Supp. at 1157-60. The Commission argued that because Congress did not intend section 6(b)(1) to apply to FOIA requests at all, it cannot be deemed to be a statute exempting material from disclosure under the FOIA. Our reading of section 6(b)(1) and its legislative history disposes of that argument. Amicus, Consumer Federation of America, argues that the requirements of section 6(b)(1) are not framed with sufficient particularity to render it an Exemption 3 withholding statute; the plaintiffs have argued the opposing position.

Exemption 3 was amended in 1976 by section 5(b) of the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1247, to further define those statutes that "specifically exempt" material from disclosure. The Conference Report to the Sunshine Act states that the amendment was intended "to overrule the decision of the Supreme Court in *Administrator, FAA* v *Robertson*, 422 U.S. 255 (1975), which dealt with section 1104 of the Federal Aviation Act of 1958 (49 U.S.C. 1504)." H.R. Conf. Rep. No. 94-1441, 94th Cong., 2d Sess. 25, *reprinted in* [1976] U.S. Code Cong. & Ad. News 2244, 2261. In *Robertson*, the Court held that a statute permitting the FAA to withhold information from public disclosure "when, in their judgment, a disclosure of such information would adversely affect the interests of [an objecting party] and is not required in the interest of the public," 49 U.S.C. § 1504, was an Exemption 3 withholding statute. The amendment to Exemption 3 was designed to eliminate from its terms those statutes that granted such broad admiinstrative discretion concerning the disclosure or nondisclosure of material within the agency's possession. Thus, the report of the House Government Operations Committee on the Sunshine Act, recommending the legislative overruling of *Robertson*, states:

> Believing that the decision misconceives the intent of exemption (3), the committee recommends that the exemption be amended to exempt only material required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information. The committee is of the opinion that this change would eliminate the gap created in the Freedom of Information Act by the *Robertson* case without in any way endangering statutes such as the Atomic Energy Act of 1954, 42 U.S.C. §§ 2161-66, which provides explicitly for the protection of certain nuclear data.
>
> Under the amendment, the provision of the Federal Aviation Act of 1958 that was the subject of *Robertson*, and which affords the FAA Administrator *carte blanche* to withhold any information he pleases, would not come within exemption 3. . . .

H.R. Rep. No. 94-880 (Part I), 94th Cong., 2d Sess. 23 *reprinted in* [1976] U.S. Code Cong. & Ad. News 2183, 2205.

Several courts of appeals have had the opportunity to construe the scope of Exemption 3 following its amendment. The District of Columbia Circuit has stated that "[n]ondisclosure is countenanced [by subsection (B) of the exemption] if, but only if, the enactment is the product of *congressional appreciation* of the dangers inherent in airing particular data and incorporates a formula whereby the administrator may determine precisely *whether disclosure in any instance would pose the hazard that Congress foresaw.*" *American Jewish Congress v. Kreps*, 574 F.2d 624, 628-29 (D.C. Cir. 1978) (emphasis supplied). *See Chamberlain v. Kurtz*, 589 F.2d 827, 839 (5th Cir. 1979) (Congress did not enact a provision excluding all statutes from Exemption 3 that left an agency with any discretion over the disclosure of

information; "it merely required that this discretion be limited to certain defined matters or that it be informed by established criteria.").

The Ninth Circuit has recently concluded that the intent of the amendment to Exemption 3 was "unmistakably to adopt" the reasoning of a pre-*Robertson* opinion of this Court in which we held that Exemption 3 can only be applied to statutes prescribing some standards or guides through which legislative judgment is reflected in the making of an administrative disclosure determination. *Lee Pharmaceuticals* v. *Kreps*, 577 F.2d 610, 615 (9th Cir. 1978), *cert. denied*, — U.S. —, 47 U.S.L.W. 3464 (1979) (citing *Stretch* v. *Weinberger*, 495 F.2d 639 (3d Cir. 1974)). *See also* Note, *Developments under the Freedom of Information Act—1976*, 1977 Duke L.J. 532, 535 (The amendment "has made clear when the FOIA refers to information specifically exempted from disclosure by *statute*, it truly means exempted by statute, and not by an agency's ad hoc determination that the information released ought not be released.")

Our examination of the language and history of section 6(b)(1) has revealed that Congress made a considered judgment that the Commission was not to release information identifying particular manufacturers unless it first notified those manufacturers of its intent to do so and took reasonable steps to satisfy itself of the accuracy and fairness of disclosure. We agree with the district court's conclusion that section 6(b)(1) is a statute of the kind described by amended Exemption 3. The requirements of that section do not afford the Commission " 'unfettered and unguided' power . . . to withhold information," *Lee Pharmaceuticals*, *supra* at 615; rather nondisclosure is authorized only when information from which the identity of a manufacturer may be readily ascertained and when the Commission has not taken (or cannot take) reasonable steps to assure that disclosure would be accurate, fair and related to the Act's purposes. The standards set forth in section 6(b)(1) are sufficiently definite that they provide a reviewing Court with criteria to measure the Commission's compliance with Congress's intent.[5]

Having concluded that section 6(b)(1) is a statute of the kind described by Exemption 3, we would ordinarily turn to the question whether the material at issue is within the nondisclosure provisions contemplated by the statute. *See National Commission on Law Enforcement and Social Justice* v. *Central Intelligence Agency*, 576 F.2d 1373, 1376 (9th Cir. 1978). In this case, however, the Commission has conceded that it cannot release the material at issue in its present form, if we hold that it is required to take the reasonable steps provided for in section 6(b)(1).

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[5] Our conclusion that section 6(b)(1) is a withholding statute within amended Exemption 3 is consistent with the view of the only commentator to have addressed the issue. *See* Note, *The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act*, 76 Column. L. Rev. 1029, 1045 n.100 (1976). Of course, implicit within the author's conclusion is a rejection of the Commission's view that section 6(b)(1) applies only to information disclosure that it affirmatively initiates.

Thus, we conclude that the material requested of the Commission was exempt from mandatory disclosure under the FOIA itself. Given our conclusion that section 6(b)(1) is an Exemption 3 withholding statute, we find no inconsistencies between the requirements of that section and the provisions of the FOIA that would compel us to reconsider our tentative conclusion that Congress intended section 6(b)(1) to be applied to the release of Commission documents pursuant to an FOIA request.

E.

In our view, this case illustrates the potential for Congress's design to be eviscerated by the Commission's proposed interpretation of section 6(b)(1). Congress's concern that manufacturers might be harmed by the public disclosure of inaccurate and misleading information obtained by the Commission is implicated in this case to the same extent that it would be implicated by a Commission press release. The Commission obtained the material at issue, otherwise unavailable to the public, through its information-gathering authority under the CPSA. The Commission's methods of defining and assembling the requested data rendered it inaccurate and would make its publication misleading. Moreover, once the Commission released the data to the public it would have no control over the use to which it might be put by the requesters.[6] The circumstances of this

[6] We note that in this case one of the requesters, Consumers Union, is the publisher of the magazine *Consumer Reports*. That fact makes it apparent that the disclosure of the information at issue, even absent the Commission's imprimatur, may have widespread adverse effects on plaintiff's business reputations. In a leading article on the subject of adverse agency publicity as a method of regulatory control, and its possible abuses, Professor Ernest Gellhorn has argued that affirmative forms of publicity must generally be distinguished from agency practices with respect to the FOIA. But he notes:

> When media coverage closely follows agency activities, affirmative publicity measures may be unnecessary because mere freedom of public access to information performs the same function. . . . In such a case, the issues involved in the Freedom of Information Act cannot be disentangled from adverse publicity issues.

Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 Harv. L. Rev. 1380, 1422 n.164 (1973). This case is illustrative of the problem foreseen by Professor Gellhorn.

case thus reinforce our view that the Commission's interpretation of section 6(b)(1) is not a reasonable one, and is, in fact, inconsistent with the avowed intent of the Congress that enacted that provision. We hold that the district court did not err in concluding that the Commission's determination to release the TV-related accident data without first complying with the requirements of section 6(b)(1) was beyond its statutory authority.

IV.

We indicated in Part II above that this Court should consider whether affirmance of the district court's order might be conditioned upon such modification as would accommodate the interests of the requesters, absent from this litigation. Having decided that the district court's conclusions of law were cor-

rect, we are led to agree that the plaintiffs here are entitled to permanent injunctive relief from the Commission's threatened disclosure of the materials at issue. *See* note 2 *supra*. No lesser measure of relief would serve to protect the interests at stake and vindicate the plaintiffs' legal right to have the Commission perform its statutory duties under section 6(b)(1) of the Consumer Product Safety Act.

Thus, the judgment of the district court will be affirmed in its entirety.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1328

GTE SYLVANIA, INCORPORATED

v.

CONSUMER PRODUCT SAFETY COMMISSION, RICHARD O. SIMPSON, BARBARA FRANKLIN, LAWRENCE KUSHNER, CONSTANCE NEWMAN, R. DAVID PITTLE, SADYE DUNN, VINCE DELUISE

(D.C. Civil No. 75-104)

RCA CORPORATION

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION, RICHARD O. SIMPSON, BARBARA H. FRANKLIN, LAWRENCE M. KUSHNER, CONSTANCE E. NEWMAN, R. DAVID PITTLE, SADYE E. DUNN, and VINCE DELUISE

(D.C. Civil No. 75-108)

THE MAGNAVOX COMPANY

v.

RICHARD O. SIMPSON, Chairman, Consumer Product Safety Commission, BARBARA FRANKLIN, Commissioner, Consumer Product Safety Commission, LAWRENCE KUSHNER, Commissioner, Consumer Product Safety Commission, CONSTANCE NEWMAN, Commissioner, Consumer Product Safety Commission, R. DAVID PITTLE, Commissioner, Consumer Product Safety Commission, SADYE DUNN, Secretary, Consumer Product Safety Commission, and VINCE DELUISE, Freedom Information Officer, Consumer Product Safety Commission, and the CONSUMER PRODUCT SAFETY COMMISSION, 1750 K Street, N.W., Washington, D.C. 20207

(D.C. Civil No. 75-112)

ZENITH RADIO CORPORATION

v.

RICHARD O. SIMPSON, Chairman, Consumer Product Safety Commission, BARBARA FRANKLIN, Commissioner, Consumer Product Safety Commission, LAWRENCE KUSHNER, Commissioner, Consumer Product Safety Commission, CONSTANCE NEWMAN, Commissioner, Consumer Product Safety Commission, R. DAVID PITTLE, Commissioner, Consumer Product Safety Commission, SADYE DUNN, Secretary, Consumer Product Safety Commission, and VINCE DELUISE, Freedom Information Officer, Consumer Product Safety Commission, and the CONSUMER PRODUCT SAFETY COMMISSION

(D.C. Civil No. 75-113)

MOTOROLA, INC.

v.

RICHARD O. SIMPSON, BARBARA FRANKLIN, LAWRENCE KUSHNER, CONSTANCE NEWMAN, R. DAVID PITTLE, SADYE DUNN, VINCE DELUISE and CONSUMER PRODUCT SAFETY COMMISSION

(D.C. Civil No. 75-114)

WARWICK ELECTRONICS, INC.

v.

RICHARD O. SIMPSON, BARBARA FRANKLIN, LAWRENCE KUSHNER, CONSTANCE NEWMAN, R. DAVID PITTLE, SADYE DUNN, VINCE DELUISE and CONSUMER PRODUCT SAFETY COMMISSION

(D.C. Civil No. 75-115)

FORD AEROSPACE & COMMUNICATIONS CORPORATION

v.

RICHARD O. SIMPSON, BARBARA FRANKLIN, LAWRENCE KUSHNER, CONSTANCE NEWMAN, R. DAVID PITTLE, SADYE DUNN, VINCE DELUISE and CONSUMER PRODUCT SAFETY COMMISSION

(D.C. Civil No. 75-116)

ADMIRAL CORPORATION, a corporation
600 Grant Street, Pittsburgh, Pennsylvania 15219

v.

UNITED STATES OF AMERICA and CONSUMER PRODUCT SAFETY COMMISSION and Individually the Members Thereof as Individuals and as Members of the Consumer Product Safety Commission, RICHARD SIMPSON, Chairman, DR. LAWRENCE KUSHNER, Vice Chairman, BARBARA HACKMAN FRANKLIN, Commissioner, CONSTANCE E. NEWMAN, Commissioner, DR. R. DAVID PITTLE, Commissioner, SADYE E. DUNN, Secretary

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(D.C. Civil No. 75-131)

GENERAL ELECTRIC COMPANY

v.

RICHARD O. SIMPSON, Chairman, R. DAVID PITTLE, Commissioner, LAWRENCE M. KUSHNER, Commissioner, CONSTANCE E. NEWMAN, Commissioner, BARBARA HACKMAN FRANKLIN, Commissioner, SADYE E. DUNN, Secretary, and CONSUMER PRODUCT SAFETY COMMISSION

(D.C. Civil No. 75-136)

MATSUSHITA ELECTRIC CORPORATION OF AMERICA,
a Corp. of Delaware

v.

CONSUMER PRODUCT SAFETY COMMISSION, SIMPSON, RICHARD O.; FRANKLIN, BARBARA; KUSHNER, LAWRENCE; NEWMAN, CONSTANCE E.; PITTLE, R. DAVID; DUNN, SADYE E.; DELUISE, VINCE

(D.C. Civil No. 75-150)

SHARP ELECTRONICS CORPORATION

v.

UNITED STATES CONSUMER PRODUCTS SAFETY COMMISSION, SIMPSON, RICHARD O.; FRANKLIN, BARBARA H.,; KUSHNER, LAWRENCE M.; NEWMAN, CONSTANCE E.; PITTLE, R. DAVID; DUNN, SADYE E.; DELUISE, VINCE

(D.C. Civil No. 75-151)

TOSHIBA AMERICA, INC.

v.

CONSUMER PRODUCT SAFETY COMMISSION, SIMPSON, RICHARD O.; FRANKLIN, BARBARA; KUSHNER, LAWRENCE; NEWMAN, CONSTANCE E.; PITTLE, R. DAVID; DUNN, SADYE E.; DELUISE, VINCE

(D.C. Civil No. 75-152)

CONSUMER PRODUCTS SAFETY COMMISSION,
APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Present:—SEITZ, *Chief Judge*, GIBBONS and HIGGINBOTHAM, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the records from the United States District Court for the District of Delaware and were argued by counsel on January 8, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed December 8, 1977, be, and the same is hereby affirmed in its entirety. Costs taxed against appellant.

ATTEST:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk

April 30, 1979

APPENDIX C

UNITED STATES DISTRICT COURT
D. DELAWARE

Civ. A. No. 75-104

GTE SYLVANIA INCORPORATED, PLAINTIFF

v.

CONSUMER PRODUCT SAFETY COMMISSION, ET AL.,
DEFENDANTS *

Dec. 8, 1977

OPINION

LATCHUM, Chief Judge.

On October 23, 1975, this Court made extensive findings of fact and conclusions of law when it granted plaintiffs' [1] motions to enjoin preliminarily

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* Consolidated with the following Plaintiffs in which Consumer Product Safety Commission is the Defendant; RCA Corp., 75-108; Magnavox Co., 75-112; Zenith Radio Corp., 75-113; Motorola, Inc., 75-114; Warwick Electronics, Inc., 75-115; Aeronutronic Ford Corp., 75-116; Admiral Corp., 75-131; General Electric Co., 75-136; Matsushita Electric Corp. of America, 75-150; Sharp Electronics Corp., 75-151; and Toshiba America, Inc., 75-152.

[1] Originally there were thirteen separate actions brought by as many television manufacturers which were consolidated for consideration of plaintiffs' motion for a preliminary injunction. Since the Court's opinion of October 23, 1975, the suit brought by Teledyne Mid-America Corp., C.A. No. 75-122, has been dismissed by stipulation of the parties. Docket Item 63 (all docket item references are to C.A. No. 75-104).

the Consumer Product Safety Commission (the "Commission") from disclosing certain "TV-related accident data" submitted by the plaintiffs and a computer printout summarizing that data to the public in response to a request made under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. *GTE Sylvania Inc.* v. *Consumer Product Safety Commission*, 404 F.Supp. 352 (D.Del.1975). Because the prior opinion sets forth the factual background of this litigation in great detail, it will not be rehearsed here.

The Court based its decision to grant a preliminary injunction on the Commission's failure to comply with Section 6(b)(1) of the Consumer Product Safety Act (the "Act"), 15 U.S.C. § 2055(b)(1). Section 6(b)(1) provides in pertinent part:

> The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, [1] that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and [2] that such disclosure is fair in the circumstances and [3] reasonably related to effectuating the purposes of [the Act].

The Court found on the uncontested facts that the Commission had wholly failed to take reasonable steps to assure that any of the three prerequisites for public disclosure of the TV-related accident data were met. 404 F.Supp. at 370-73.

The consolidated cases are presently before the Court (1) on plaintiffs' motion for summary judg-

ment to make the preliminary injunction permanent [2] and (2) on the Commission's motions to vacate the outstanding preliminary injunction and for summary judgment.[3]

Despite the two-year passage of time, the undisputed facts upon which the Court based its earlier decision have not changed. Thus, the Court need not reconsider any of its earlier findings and conclusions in order to take account of any intervening changes in the *factual* situation. However, the Commission does contend that there have been intervening *changes of law* which should prompt this Court to reconsider its previous decision. To these arguments we now turn.

I. COMMISSION'S INTERPRETATION OF SECTION 6(b)

First, in opposing the plaintiffs' motions for a preliminary injunction, the Commission suggested that Section 6(b)(1) applies only to affirmative disclosures initiated by the agency, such as press releases and publications, and not to disclosures made in response to FOIA requests.[4] The Court rejected such an interpretation of Section 6(b) because it contravened the legislative history of the section.[5] Never-

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[2] Docket Item 86.

[3] Docket Items 79 & 80.

[4] *See* Docket Items 35, p. 14, n.4.

[5] *GTE Sylvania Inc.* v. *Consumer Product Safety Commission, supra*, 404 F.Supp. at 369-70.

theless, the Commission has renewed the argument, contending that two developments since the Court's previous decision support the Commission's position. The developments are: (1) the Commission formally endorsed the interpretation of Section 6(b)(1) which limits the section's applicability to "affirmative" disclosures initiated by the agency,[6] and (2) Congress, in explaining a 1976 amendment to Section 29 of the Act (15 U.S.C. § 2078), used language which arguably indicates acceptance of the Commission's interpretation. After considering both these developments, however, the Court remains convinced that Congres did not intend to make Section 6(b) inapplicable in the face of an FOIA request.

The Commission, relying on three Supreme Court cases,[7] contends that its interpretation of Section 6(b) deserves great weight in this Court. Although the cases cited establish the principle that on matters

[6] The Commission recorded its interpretation of Section 6(b) as a "minute" of an executive session held on October 6, 1975 (Docket Item 80, Ex.C). Although that interpretation preceded the decision on the preliminary injunction motion by a few weeks, the Commission did not inform the Court of it at that time. In addition, the Commission recently published proposed procedures for complying with Section 6(b). 42 Fed.Reg. 54, 304 (1977) (to be codified in 16 C.F.R. Part 1013). In the prefatory comments, the Commission reiterated its view that Section 6(b) applies only when it "actively and publicly discloses information." *Id.*

[7] *E. I. duPont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54, 97 S.Ct. 2229, 2234, 53 L.Ed.2d 100 (1977); *Zemel* v. *Rusk*, 381 U.S. 1, 11, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965); *Udall* v. *Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965).

of statutory construction a court should give deference "to the interpretation given the statute by the officers or agency charged with its administration," [8] they do not justify the application of that principle in this case. Two of them, *Zemel* v. *Rusk*, 381 U.S. 1, 11-12, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965) and *Udall* v. *Tallman*, 380 U.S. 1, 16-18, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965), involved long-established administrative interpretations which the respective agencies had applied consistently and frequently.[9] In sharp contrast, the interpretation being advanced by the Commission here did not arise until after the present controversy began. The third case cited by the Commission, *E. I. duPont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54, 97 S.Ct. 2229, 2234, 53 L.Ed.2d 100 (1977), is also distinguishable. There, the Supreme Court held that the the Fourth Circuit erred in substituting its judgment for that of

[8] *Udall* v. *Tallman, supra*, 380 U.S. at 16, 85 S.Ct. at 801.

[9] In both cases, Congress knew about the administrative interpretations of the statutes in question but had not amended those statutes. The Court viewed such Congressional inaction as indicating approval of the agency's position. *Zemel* v. *Rusk, supra*, 381 U.S. at 11, 85 S.Ct. 1271; *Udall* v. *Tallman, supra*, 380 U.S. at 17-18, 85 S.Ct. 792. It is noteworthy that since this Court rejected the Commission's interpretation in its prior decision, Congress has not amended Section 6(b), although that decision has been brought to Congress' attention and other sections of the Consumer Product Safety Act have been amended. *See* Consumer Product Safety Commission Improvements Act of 1976, Pub.L.No. 94-284, 90 Stat. 503; for instances where representatives of the Commission discussed this Court's prior decision before Congressional committees, *see* Docket Item 112, pp. 24-25.

the Securities Exchange Commission ("SEC") as to the appropriate method for determining value in a merger involving a closed end investment company. The Court noted that the SEC had "long recognized" the method it used, and that it was, "as Congress contemplated, the product of the agency's long and intimate familiarity with the investment company industry." *Id.* at 55, 97 S.Ct. at 2234. This case, on the other hand, presents a narrow legal issue which is readily susceptible to judicial resolution and requires no special expertise of the Commission. In sum, because none of the factors which warrant deference to an agency's position exist in this case, the Court will accord no special weight to the Commission's interpretation of Section 6(b)(1).

The second development which the Commission contends supports its interpretation of Section 6(b)(1) is a statement in the legislative history of a 1976 amendment to Section 29 of the Act.[10] Section 29, 15 U.S.C. § 2078, concerns cooperation between the Commission and other federal and state agencies. The 1976 amendment authorizes the Commission to provide nonconfidential portions of accident and investigation reports to such agencies. 15 U.S.C. § 2078(e). The amendment further provides:

> No Federal agency or State or local agency or authority may disclose to the public any information contained in a report received by the

[10] Consumer Product Safety Commission Improvements Act of 1976, Pub.L.No. 94-284, § 15, 90 Stat. 510 (amending 15 U.S.C. § 2078 (Supp. III 1973)).

> agency or authority under this subsection unless with respect to such information the Commission has complied with the applicable requirements of section [6(b) of the Act]. *Id.*

The explanation of the amendment to Section 29 contained in the Conference Report includes the following statement:

> The requirement that the Commission comply with section 6(b) prior to another Federal agency's public disclosure of information obtained under the Act is not intended by the conferees to *supersede or conflict with* the requirements of the [FOIA] (5 U.S.C. 552(a)(3 and (a)(6)). The former relates to public disclosure initiated by the Federal agency while the latter relates to disclosure initiated by a specific request from a member of the public under the [FOIA].

H.R. Rep. No. 1022, 94th Cong., 2d Sess. 27, *reprinted in* [1976] U.S. Code Cong. & Admin. News p. 1029 (emphasis supplied).

Although the statement of the Conference Committee appears consistent with the interpretation espoused by the Commission, it does not present a reliable basis for inferring that four years earlier, when Section 6(b) was enacted, Congress intended to make it inapplicable to disclosures made in response to FOIA requests. "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U.S. 304, 313, 80 S.Ct. 326, 332, 4 L.Ed.2d 334 (1960), *quoted in United States* v. *Philadelphia Na-*

tional Bank, 374 U.S. 321, 348-49, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963). Similarly, the impact of the Conference Committee's statement is diminished by the failure of Congress to amend Section 6(b) in 1976, when it presumably knew [11] of the prior decision in this case, in which the Court stated:

> "To argue that [Section 6(b)(1)] becomes irrelevant during the pendency of a FOIA demand is to ignore a clear Congressional concern both for the accuracy of the information disseminated and for the damage that an identified manufacturer might suffer. Congress was aware that FOIA requests for information gathered by the Commission would be forthcoming but, nevertheless, imposed affirmative obligations on the Commission which cannot flippantly be avoided." *GTE Sylvania Inc.* v. *Consumer Product Safety Commission, supra*, 404 F.Supp. at 370 (footnote omitted).

Finally, by stating that they did not intend the Section 29 requirement of compliance with Section 6(b) "to supersede or conflict with the requirements of the [FOIA] (5 U.S.C. 552(a)(3) and (a)(6))," the conferees emphasized the need for some sort of accommodation between the different time restraints imposed by Section 6(b) and the FOIA. Notably, the statement does not make Section 6(b) altogether inapplicable in the face of a FOIA request, as the Commission would do.

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[11] *See* note 9 *supra*.

The provisions of the FOIA cited by the conferees [12] impose a duty on federal agencies to respond within ten days in most cases, and promptly in any event, to FOIA requests. Section 6(b)(1) provides that at least thirty days prior to disclosing information from which the identity of a manufacturer can be readily ascertained the Commission must, "to the extent practicable, notify" such manufacturer and provide him "with a reasonable opportunity to submit comments to the Commission in regard to such information." 15 U.S.C. § 2055(b)(1). The Commission contends that an "impermissible conflict" exists between the thirty-day notice requirement of Section 6(b) and the ten-day time limit for responses under the FOIA.[13] The Court disagrees, because in 1972 when Congress enacted the Consumer Product Safety Act, the FOIA required only that an agency make records "promptly available" to any person requesting them.[14] The ten-day requirement was not introduced until

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[12] Subsection (a)(3) of 5 U.S.C. § 552 provides that each agency, upon request, shall make reasonably described records "promptly available" to the requester. Subsection (a)(6) requires an agency to determine within ten days (excepting Saturdays, Sundays and legal public holidays) after the receipt of a FOIA request whether to comply with the request and provides for a ten-day extension of that time limit in "unusual circumstances." Subsection (a)(6) further provides that a requester shall be deemed to have exhausted his administrative remedies if the agency fails to comply with the prescribed time limits. 5 U.S.C. § 552(a)(6)(C).

[13] Docket Item 81, pp. 17-19.

[14] Pub.L.No. 90-23, 81 Stat. 54 (1967) (current version at 5 U.S.C. § 552(a)(6)).

1974, when Congress amended the FOIA.[15] Given that Section 6(b) has not been amended since 1972, the differences between the time periods specified in Section 6(b) and the FOIA cannot be used to infer a Congressional intent to limit the application of Section 6(b) to affirmative disclosures. Indeed, such an interpretation completely ignores the legislative history of Section 6(b). *See Pierce & Stevens Chemical Corp.* v. *Consumer Product Safety Commission*, 439 F.Supp. 247 (W.D.N.Y., 1977).

The Court concludes, therefore, that Section 6(b) applies to all disclosures which are not exempted from compliance by Section 6(b)(2), 15 U.S.C. § 2055(b)(2),[16] and the Commission should attempt to accommodate the time periods of both statutes to the fullest extent practicable.[17]

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[15] Pub.L.No. 93-502, § 1(c), 88 Stat. 1562 (1974) (codified at 5 U.S.C. § 552(a)(6)).

[16] The Commission contends that if Section 6(b)(1) applies in this case, it also must apply to thousands of other records, such as consumer complaints and petitions for rulemaking under Section 10 of the Act, 15 U.S.C. § 2059, which are regularly requested under the FOIA. Docket Item 81, pp. 18-19. The Court expresses no opinion on this proposition, except to note, without deciding, that petitions for rulemaking under Section 10 arguably are exempt from the requirements of Section 6(b)(1) as information concerning an administrative proceeding within the meaning of Section 6(b)(2)(B).

[17] *Cf. Chrysler Corp.* v. *Schlesinger*, 565 F.2d 1172, at 1193 (C.A. 3, 1977). In the *Chrysler* case, a government agency notified Chrysler that it had received a request under the FOIA for certain documents concerning one of Chrysler's plants. The agency's regulations permitted a contractor to challenge a decision to disclose such information and guaranteed a final decision within thirty days from the date the challenge was filed. *Id.* at 1179 n.27. Due to the ten-day response time prescribed by the FOIA, the agency, upon deciding to release the information, informed Chrysler that it could nto await the results of an administrative appeal and would release the information five working days later. *Id.* at 1180. Chrysler filed in a district court to enjoin the disclosure and the Third Circuit held the case was ripe for judicial review despite Chrysler's failure to exhaust its administrative appeal remedy. *Id.* at 1192. Contrary to the Commission's contention (Docket Item 111, p. 5), the Court in *Chrysler* did not "reject[] agency proceedings which would conflict with the mandate of the FOIA time requirements"; rather, the court resolved the conflict in a manner calculated to give effect to the purposes of both the FOIA and the administrative review procedures.

II. AMENDMENT TO FOIA EXEMPTION 3

Next, the Commission argues that the Court should reconsider and reverse its prior holding that Section 6(b)(1) is a withholding statute within the meaning of Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3), because Congress amended that exemption in 1976 with the express intent of overruling the Supreme Court's ruling in *FAA* v. *Robertson*, 422 U.S. 255, 95 S.Ct. 2140, 45 L.Ed.2d 164 (1975), upon which this Court relied in reaching its previous decision. Although the change in the law clearly necessitates reconsideration of the issue, the Court cannot agree with the defendants' position that Exemption 3, as amended, does not exempt material withheld pursuant to Section 6(b)(1).

Originally, Exemption 3 of the FOIA provided:

> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (3) specifically exempted from disclosure by statute.

5 U.S.C. § 552(b)(3) (1970) (amended 1976). Congress amended this exemption in 1976 to exclude from the mandatory disclosure provisions of the FOIA, matters that are

> (3) specifically exempted from disclosure by statute . . ., provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.[18]

The Conference Committee, which was responsible for the language of the amendment as finally enacted, explained the purpose of the amendment as follows:

> The conferees intend this language to overrule the decision of the Supreme Court in *Administrator, FAA* v. *Robertson*, 422 U.S. 255, 95 S.Ct. 2140, 45 L.Ed.2d 164 (1975), which dealt with section 1104 of the Federal Aviation Act of 1958 (49 U.S.C. 1504). Another example of a statute whose terms do not bring it within this exemption is section 1106 of the Social Security Act (42 U.S.C. 1306).[19]

[18] Pub.L.No. 94-409, § 5(b), 90 Stat. 1241 (1976). The amendment passed as a rider to the Government in the Sunshine Act. Note, *The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act*, 76 Column.L. Rev. 1029, 1041 n.70 (1976).

The thrust of the defendants' argument is that Section 6(b)(1) is indistinguishable from the statute involved in *FAA* v. *Robertson, supra.* Because Congress expressed a clear intent to exclude Section 1104 of the Federal Aviation Act of 1958 (49 U.S.C. § 1504) from Exemption 3, the Commission contends that Section 6(b)(1) of the Consumer Product Safety Act (15 U.S.C. § 2055(b)(1)) must be excluded from the exemption as well.

Section 1104 authorizes the Administrator, upon receipt of a written objection, to withhold information from public disclosure if, in his judgment, disclosure "would adversely affect the interests of [the objecting party] and is not required in the interest of the public." 49 U.S.C. § 1504. By holding that information withheld pursuant to Section 1104 constituted matter "specifically exempted from disclosure by statute" within the meaning of the original Exemption 3, the Supreme Court in *FAA* v. *Robertson, supra*, made it possible for government officials to avoid the mandatory disclosure provisions of the FOIA on general discretionary grounds such as "in the public interest." Congress reacted by amending

[19] H.R.Rep.No. 1441, 94th Cong., 2d Sess. 14, *reprinted in* [1976] U.S.Code Cong. & Admin. News 2250 (Conference Report). The intent to undo *FAA* v. *Robertson, supra*, was also evident earlier in the legislative process. *See* H.R.Rep. No. 880, Part I, 94th Cong., 2d Sess. 9-10, *reprinted in* [1976] U.S.Code Cong. & Admin. News pp. 2191-92; Note, *supra* note 18, 76 Colum.L.Rev. at 1042-44.

Exemption 3 to prevent agencies from avoiding disclosure on such nebulous grounds.[20]

After comparing the two statutes, the Court concludes that Section 6(b)(1) does not afford the Commission the same broad discretion to withhold information that Section 1104 gives to the Administrator of the FAA. Section 6(b)(1) requires the Commission, as a prerequisite to disclosing "information from which the identity of [a] manufacturer or private labeler may be readily ascertained," to "take reasonable steps to assure": (1) that the information is "accurate," (2) that the disclosure is "fair in the circumstances," and (3) that the disclosure is "reasonably related to effectuating the purposes of [the Act]." 15 U.S.C. § 2055(b)(1). The requirement of accuracy most clearly distinguishes Section 6(b)(1) from Section 1104 of the Federal Aviation Act, because "accuracy "is a more definite and objective standard than the "interest of the public." Similarly, the Court considers the fairness criteria in Section 6(b)(1) more susceptible to effective judicial review than the public interest standard of Section 1104.[21]

Having found Section 6(b)(1) distinguishable from the statutes [22] which Congress specifically stated

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[20] *See Seymour* v. *Barabba,* 559 F.2d 806, 807 (C.A.D.C. 1977).

[21] *See* Note, *supra* note 18, 76 Colum.L.Rev. at 1045 & n.100.

[22] Besides Section 1104 of the Federal Aviation Act of 1958 (49 U.S.C. § 1504), the Conference Report also identified Section 1106 of the Social Security Act (42 U.S.C. § 1306) as a statute whose terms do not bring it within Exemption

would not be covered by Exemption 3, we now turn to the language of the exemption itself to determine whether Section 6(b)(1) falls within its ambit. The two provisos of Exemption 3 are in the disjunctive. Subpart A exempts from the FOIA matters that are "specifically exempted from disclosure by statute . . . , provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." Because Section 6(b)(1) affords the Commission some discretion in determining whether to withhold material from the public, it is not the type of mandatory nondisclosure statute described in subpart A of Exemption 3. *See Irons* v. *Gottschalk,* 179 U.S.App.D.C. 37, 39 n. 3, 548 F.2d 992, 994 n. 3 (1976), *cert. denied* —— U.S. ——, 98 S.Ct. 505, 54 L.Ed.2d 451 (1976). Subpart B exempts matters authorized to be withheld pursuant to one of two distinct types of statutes: (1) those which establish "particular criteria for withholding" and (2) those which "refer[] to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3); *see Kruh* v. *General Services Adminis-*

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3. H.R.Rep.No. 1441, 94th Cong., 2d Sess. 14, *reprinted in* [1976] U.S.Code Cong. & Admin. News p. 2250 (Conference Report). Section 1106 of the Social Security Act prohibits disclosure of a wide range of social security information, except as the Secretary of HEW or the Secretary of Labor "may by regulations prescribe." 42 U.S.C. § 1306(a). Thus, Section 1306 vests virtually "unfettered and unguided power" in the Secretary to determine what information to disclose. *Stretch* v. *Weinberger,* 495 F.2d 639, 640 (C.A. 3, 1974). As indicated above, the Commission's discretion under Section 6(b)(1) is much more circumscribed.

tration, 421 F.Supp. 965, 967 n. 4 (E.D.N.Y. 1976). The plaintiffs argue that Section 6(b)(1) satisfies both the standards contained in subpart B of Exemption 3. However, because the Court agrees that Section 6(b)(1) establishes particular criteria for withholding, it is unnecessary to decide whether the statute also refers to particular matters to be withheld.

The only guidance which Congress provided concerning the contours of the exemption for statutes establishing particular criteria for withholding is that it does not extend to statutes like the one at issue in *FAA* v. *Robertson, supra*. The few cases decided since the amendment became effective in March of 1977 have not shed much more light on the matter.[23] It is noteworthy, however, that the only commentator to address the issue has concluded that Section 6(b)(1) would fall within the amended Ex-

[23] In a case strikingly similar to this one, a district court judge held that Section 6(b)(1) of the Act "is a statute setting forth particular criteria for withholding information" and, therefore, falls within the ambit of FOIA Exemption 3. *Pierce & Stevens Chemical Corp.* v. *Consumer Product Safety Commission*, 439 F.Supp. 247, 251-252 (W.D.N.Y. 1977). In that case, however, the court relied on *FAA* v. *Robertson, supra* and this Court's prior decision without discussing the legislative history of the amendment to Exemption 3 and its effect on the continuing validity of those two precedents. Two other cases decided after the amendment to Exemption 3 became effective concerned Subpart A and the "particular types of matter" standard of Subpart B of the exemption, respectively. *See Seymour* v. *Barabba*, 559 F.2d 806 (C.A. D.C. 1977); *Founding Church of Scientology* v. *National Security Agency*, 434 F.Supp. 632 (D.D.C. 1977).

emption 3, under the "particular criteria for withholding" rubric. Note, *supra* note 18, 76 Colum.L. Rev. at 1045 n. 100. The legislative histories of Section 6(b)(1) and Exemption 3 support the same conclusion. As the Court stated in its prior decision in this case, Section 6(b)(1) reflects the balance struck between the Commission's need to have complete access to information relevant to its statutory responsibilities and Congress' "concern both for the accuracy of the information disseminated and for the damage that an identified manufacturer might suffer." *GTE Sylvania Inc.* v. *Consumer Product Safety Commission, supra*, 404 F.Supp. 352, 370 & n. 79. Due to the sensitive nature of much of the information the Consumer Product Safety Act authorized the Commission to gather, the House Committee on Interstate and Foreign Commerce reported that it had

> written into section 6 [15 U.S.C. § 2055] of the bill *detialed requirements and limitations relating to the Commission's authority to disclose information which* it acquires in the conduct of its responsibilities under this Act.

H.R.Rep. No. 1153, 92d Cong., 2d Sess. 31 (1972) (emphasis supplied). As the emphasized language makes clear, Congress intended Section 6(b)(1) to limit the discretion of the Commission to disclose information submitted to it.

A review of the legislative history of the original version of Exemption 3 led the Third Circuit "to a firm conviction that the absence of [legislatively pre-

scribed] standards to govern broad agency discretion was the chief evil at which Congress aimed." *Stretch* v. *Weinberger*, 495 F.2d 639, 640-41 & n. 5 (C.A. 3, 1974). Nothing in the legislative history of the amendment to Exemption 3 suggests that the intent of Congress has changed.[24] Rather, the amendment overruled *FAA* v. *Robertson, supra*, in which the Supreme Court, according to Congress, had "misconceive[d] the intent of Exemption 3" by interpreting it to include a statute which granted an agency almost unlimited discretion to withhold documents. *See* H.R. Rep. No. 880, 94th Cong., 2d Sess., pt. 1, at 23; *reprinted in* [1976] U.S. Code Cong. & Admin. News p. 2205; *Seymour* v. *Barabba, supra*, 559 F.2d at 807. Congress did not exclude from the amended Exemption 3 all statutes which give an agency some discretion concerning whether to disclose certain information. Therefore, the Court concludes that Section 6(b)(1), which requires the Commission to take reasonable steps to assure accuracy, fairness and a statutory purpose before disclosing information which identifies a manufacturer, establishes particular criteria for withholding and falls within Exemption 3 of the FOIA, as amended.

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[24] *See generally Note, supra* note 18, 76 Colum.L.Rev. at 1041-43. The author concluded that Congress intended to limit the exemption to statutes in which the concern for secrecy emanated from Congress rather than the agency. *Id.* He would assess the particularity of the criteria for withholding information acocrding to their amendability to *de novo judicial* review, as provided for by the FOIA. *Id.* at 1045.

III. THIRD CIRCUIT'S DECISION IN CHRYSLER v. SCHLESINGER

The final legal development which the Commission contends should lead this Court to modify the findings and conclusions made in conjunction with the issuance of the preliminary injunction is the decision of the Third Circuit in *Chrysler Corp.* v. *Schlesinger*, 565 F.2d 1172 (C.A. 3, 1977). In *Chrysler* the court held that "the APA provides a cause of action for enjoining an agency from disclosing submitter-generated information," citing with approval the prior decision in this case. *Id.* at 1190 n. 88.[25] In addition to recognizing a reverse FOIA cause of action, the Third Circuit suggested that in such cases the courts employ the following analytical approach in reviewing an agency's decision to disclose:

> First it should inquire whether any non-disclosure statute or non-disclosure regulation is applicable. If so, the court must conclude that the agency has acted outside the scope of its statutory authority, and should enjoin disclosure. If no non-disclosure statute or regulation applies, the court must then determine under what authority the agency intends to disclose the contested information. If the agency has concluded that the contested information does not fall within any FOIA exemption, thus mandating disclo-

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[25] In light of *Chrysler Corp.* v. *Schlesinger, supra*, the Commission has abandoned its argument that this Court lacks jurisdiction to review the decision to release the records at issue here. Docket Item 118, p. 5.

> sure, the court must examine whether the agency applied the proper legal standards for the applicability of the FOIA exemptions. * * * Finally, if the agency record does not establish, or insufficiently explains, the basis for the agency's decision, so as not to permit the reviewing court to effectively perform the above analysis, the remedy is not a trial *de novo*, but a remand to the agency for an additional record or explanation for its decision.

Id. at 1192 (footnote omitted).

In the case *sub judice*, the Commission concluded that the contested information did not fall within any FOIA exemption. Having already decided that, by virtue of Section 6(b)(1) of the Act, Exemption 3 applies to the accident data the Commission intends to disclose, the Court will bypass the first of the suggested inquiries—"whether any non-disclosure statute or non-disclosure regulation is applicable." [26] Instead, the Court turns to the Commission's alternative argument that, even if Exemption 3 applies, the Commission has complied with the requirements of Section 6(b)(1).

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[26] At oral argument, the plaintiffs argued that Sections 6(a)(2) and 6(b)(1) of the Consumer Product Safety Act (15 U.S.C. §§ 2055(a)(2) and (b)(1)) and 18 U.S.C. § 1905, which is incorporated in Section 6(a)(2), are "non-disclosure statutes" as that phrase was used in the *Chrysler* opinion. (Transcript ("T. —") 17-19). The Commission disputed the characterization of Section 6(b)(1) as a "non-disclosure statute" and argued that the plaintiffs have not shown that the contested information is protected from disclosure by Section 6(a)(2) and 18 U.S.C. § 1905. (T. 30-31, 38-39). The Court expresses no opinion on these issues.

The decision to grant the plaintiffs' motions for a preliminary injunction was based on the finding that the Commission had not satisfied its duty under Section 6(b)(1) to take reasonable steps to assure (1) that the accident data is "accurate," (2) that disclosure would be "fair in the circumstances," and (3) that disclosure would be "reasonably related to effectuating the purpose of [the Act]." *GTE Sylvania Inc.* v. *Consumer Product Safety Commission, supra,* 404 F.Supp. at 370-73. The Court expressly held that the Commission's proposals (1) to release the accident data with a statement pointing out the differing qualities of recordkeeping among the manufacturers and (2) to correct any inaccuracies identified by the manufacturers were insufficient to satisfy the affirmative duties imposed by Section 6(b)(1). *Id.* at 371-72 & n. 81. Nevertheless, the Commission now argues that these steps, together with an offer to release with the data "statements prepared by the manufacturers describing how their subpoenaed data should be viewed," constitute compliance with the three criteria for disclosure.[27] Not wishing to repeat the analysis in its prior opinion, the Court notes only that the inclusion of such statements by the manufacturers will not facilitate meaningful comparisons of the

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[27] Docket Item 81, p. 35. In *Pierce & Stevens Chemical Corp.* v. *Consumer Product Safety Commission, supra,* 439 F.Supp. at 250 n.3, the court concluded that the inclusion of a statement by the manufacturer asserting its viewpoint would not dispel the possibility of irreparable harm from disclosure of information like that at issue here.

accident data to determine the relative safety of the various manufacturers' products. Much of the data will remain unverified. The inaccuracies and unfairness introduced by the Commission's failure to clarify ambiguities in the definition of "TV-related accident" in the subpoenas and to seek full compliance with its subpoenas will persist. In short, the Commission still has failed to demonstrate that disclosure is reasonably related to effectuating the purposes of the Act.[28] Accordingly, the Court finds that the Commission has not fulfilled its responsibilities under Section 6(b)(1).

The last step in the analytical framework set forth in *Chrysler Corp.* v. *Schlesinger, supra,* requires a remand to the agency, "if the agency record does not establish, or insufficiently explains, the basis for the agency's decision, so as not to permit the reviewing court to effectively perform the . . . analysis." Seizing upon this language, the Commission argues that a remand is appropriate here, because "the record is unclear, as to whether or not 6(b)(1) was considered" in processing the request for the accident reports.[29] The Court disagrees. As noted in the prior

[28] The fact that the accident data could be compared profitably on the basis of the presence or absence of safety features or on the basis of type, such as black and white televisions versus color televisions, is irrelevant. The Commission could accomplish that purpose without identifying the manufacturers.

[29] T. 30; Docket Item 118, p. 7.

opinion,[30] the administrative record in this case supplemented by the affidavit of Constance B. Newman,[31] Vice Chairman of the Commission, and the deposition of Robert L. Northedge,[32] who was the project director of the Commission's investigation of television

[30] *GTE Sylvania Inc.* v. *Consumer Product Safety Commission, supra,* 404 F.Supp. at 368-69 & n.70.

[31] Docket Item 27 (C.A. No. 75-112).

[32] Based on the holding in *Chrysler Corp.* v. *Schlesinger, supra,* 565 F.2d at 1191, 14 Empl.Prac.Dec. ¶ 7868, at 6311, that judicial review in reverse FOIA cases should be limited to the administrative record and should not involve a trial *de novo,* the Commission now contends that the Court should not consider portions of the Northedge deposition. (T. 43). The argument is without merit. This Court's determinations in the prior opinion concerning the scope of judicial review and the materials to be reviewed comport completely with the principles expressed in the *Chrysler* case. Relying on *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 420, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), and *Camp* v. *Pitts,* 411 U.S. 138, 142-43, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973), the Court decided to supplement the administrative record with the Newman affidavit and Northedge deposiiton in order to understand the basis for the Commission's decision to disclose the accident data. *GTE Sylvania Inc.* v. *Consumer Products Safety Commission, supra,* 404 F.Supp. at 367-68. The Third Circuit explicitly recognized the propriety of such a procedure in the *Chrysler* opinion. 565 F.2d at 1192 n.96. Mr. Northedge occupied a position of responsibility with respect to gathering and processing of the TV-related accident data. The Commission itself produced him as the person best able to explain the data gathering process. The Court concludes therefore, that there is no reason to exclude the Northedge deposition. Moreover, the opinions expressed by Mr. Northedge concerning the misleading nature of the information and the absence of any use for it are merely cumulative, and do not form the basis for the Court's decision.

hazards, provides this Court with an adequate foundation for effective review. Moreover, the Court foresees no benefit which possibly could flow from a remand in the circumstances of this case.

CONCLUSION

In conclusion, the Commission has presented no new facts which warrant modification of the findings of fact and conclusions of law made in conjunction with the issuance of the preliminary injunction. The Commission has referred to several changes in the law since the Court's prior decision, but none of these affect the validity of the previous conclusions. Specifically, the Court rejects the Commission's interpretation of Section 6(b)(1) as applying to "affirmative" agency disclosures, but not to disclosures made in response to FOIA requests. Where as in this case, an FOIA request is received for information from which the identity of a manufacturer can be readily ascertained and which is otherwise subject to Section 6(b)(1), the Commission must comply with Section 6(b)(1) before disclosing that information. Furthermore, if the Commission fails to take reasonable steps to assure that the information is accurate and that disclosure will be fair and serve a statutory purpose, the information will be exempt from disclosure under FOIA Exemption 3. The TV-related accident data at issue here is exempt from disclosure, because the Court finds that the Commission still has not complied with Section 6(b). Finally, the Court finds that the disclosure of this information in

its present unverified state and in a manner which identifies the manufacturers would result in irreparable harm to the plaintiffs for the reasons set forth in the Court's previous opinion. 404 F.Supp. at 373-74.

Accordingly, the plaintiffs' motion for summary judgment will be granted and a permanent injunction against the public disclosure of the accident data and the computer printout will be entered.

This opinion shall constitute the findings of fact and conclusions of law required by Rule 52, F.R. Civ.P.

JUDGMENT AND PERMANENT INJUNCTION

On the basis of findings of fact and conclusions of law set forth in the Court's opinion of October 23, 1975 (404 F.Supp. 352) and the Court's opinion of this date entered in these cases, it is

ORDERED

1. Summary judgment is hereby entered in favor of the plaintiffs and against the defendants.

2. Defendants' motions to vacate the outstanding preliminary injunction and for summary judgment are denied.

3. The defendants Consumer Product Safety Commission ("Commission"), its members, agents, officers, employees and all other persons in active concert and participation with them are hereby enjoined from disclosing to the public in any manner:

(a) Any data submitted by plaintiffs to the defendant Commission in response to a special order issued May 13, 1974;
(b) Any data submitted by plaintiffs to the Commission in response to a subpoena duces tecum issued by the Commission on July 26, 1974; and
(c) Any report, extraction, computer analysis, or other document or documents purporting to be a summary or compilation of the data previously supplied to the Commission described in subparagraphs (a) and (b) above.

4. Provided, however, the Commission is not enjoined hereby from making certain limited disclosures to Underwriters Laboratories, Inc. ("UL"), the entity retained by the Commission to develop safety standards for television receivers under 15 U.S.C. § 2056, upon the following terms and conditions:

(a) UL and those assisting in development of safety standards for television receivers shall be permitted access to computerized summaries of "accident reports" submitted to the Commission in response to the Commission's July 26, 1974 subpoena duces tecum (served on 12 television manufacturers) in a form that does not, directly or indirectly, identify the manufacturer, model or chassis number of any television receiver alleged to have been involved in any "accident" or the number of "accidents" allegedly associated with any particular manufacturre, model or chassis. The computerized summaries shall contain no identifying symbols which will permit identification of "accidents" reported by a single manufacturer.

(b) For the sole purpose of developing safety standards for television receivers and not for public disclosure, the following employees of UL shall be permitted access to all of the "accident reports" and data submitted to the Commission by the 12 television manufacturers: Mr. S. David Hoffman, Mr. John Stevenson, Mr. Steven Coen and Ms. Frances Newell. These four employees of UL will make use of such "accident reports" and data only in connection with the development of safety standards for television receivers and will not disclose the "accident reports" or data nor make any written or oral reports of the contents thereof to any person other than an employee of the Commission. No other written or oral reports will be prepared by these four employees of UL, which will in any way, directly or indirectly, identify the manufacturer, model or chassis number of any television receiver alleged to have been involved in any "accident" or the number of "accidents" allegedly associated with any particular manufacturer, model or chassis.

5. Provided further, however, that the Commission is not enjoined hereby from public disclosure of the "Report on Analysis of TV Accident Data to Consumer Product Safety Commission," dated April 25, 1975 by Robert A. Yereance (the "Yereance Report") so long as that Report or any accompanying information does not in any way, directly or indirectly, identify the manufacturers, model or chassis number of any television receivers alleged to have been involved in any "accidents" allegedly associated with any particular manufacturre, model or chassis.

6. Copies of this permanent injunction shall be furnished to Messrs. Hoffman, Stevenson and Coen, and Ms. Newell, and all others assisting UL in the development of safety standards for television receivers forthwith.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 301383 85

APPENDIX

VOLUME I—(pp.1-177)

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-521

CONSUMER PRODUCT SAFETY COMMISSION,
Petitioner

—*v.*—

GTE SYLVANIA, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FILED SEPTEMBER 27, 1979
PETITION FOR A WRIT OF CERTIORARI GRANTED
DECEMBER 3, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-521

CONSUMER PRODUCT SAFETY COMMISSION,
Petitioner

—*v.*—

GTE SYLVANIA, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX TO APPENDIX
VOLUME I

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
4/21/75	#1	Complaint for declaratory judgment and injunction. Summons issued. (Exit writ to Marshal.)
4/24/75	#2	Pltf's. application for T.R.O.
4/24/75	#4	Application for preliminary injunction.
4/24/75	#5	Affidavit of W. Daniel Schuster.
4/24/75	#6	Affidavit Kenneth C. Thomson.
4/24/75	#7	Affidavit of Robert L. Palmer
4/25/75	H.	Hearing Latchum J. are T.R.O.—GRANTED.
4/28/75	#8	Notice of Assignment of J. (Latchum). Notice to Counsel.
5/14/75	C.	Conf. Latchum. Arg. 7/16/75 11 a.m.
5/29/75	#10	ORDER LATCHUM Ch J consolidating the following cases C.A. 75-104, 108, 112, 113, 114, 115, 116, 122, 131 & 136 for purposes of discovery, briefs etc. & Arg. set for 7/23/75 at 11:00 Am. (Notice to counsel).
5/29/75	#11	ANSWER.
6/16/75	#13	Sealed envelope containing Motion to modify T.R.O., affidavit of Richard O. Simpson, memo. in support of motion w/proposed order. (Govt's).
6/17/75	#14	Govt's. notice of hearing on defts'. motion to modify T.R.O. 6/30/75 at 2 p.m.
6/19/75	#15	Sealed envelope Memo of Motorola in support of motion for prelim. inj.
6/19/75	#16	Sealed envelope Memo of Matsushita in support of motion for prelim. inj.
6/19/75	#17	Sealed envelope Memo of Toshiba in support of motion for premlim. inj.
6/19/75	#18	Sealed envelope Affidavit of Hajime Yamato.
6/19/75	#19	Sealed envelope Affidavit of Yoshihiro Nagatake.

DATE	NR.	PROCEEDINGS

6/19/75 #22 Joint Memo of law for Magnavox & Zenith in support of motion for prelim. inj.

6/25/75 #24 Joint memo. in support of applications for prelimin. injunc. (Sealed)

6/25/75 #25 Affidavit of Richard L. Sanderson. (Sealed)

6/25/75 #26 Affidavit of John F. Eisenmann. (Sealed)

6/25/75 #27 Joinder by Sharp Electronics Corp. in joint memo. of law submitted on behalf of Zenith and Magnavox.

6/26/75 #28 Joint memo. of GTE Sylvania and Aeronutronic Ford in response to defts'. motion for modification of outstanding T.R.O.s.

6/27/75 #29 Response by Matsushita to Consumer Product's motion to modify T.R.O. (Sealed)

6/27/75 #30 Govt's. supplement to motion to modify T.R.O.

6/27/75 #31 Admiral's response to defts'. motion for order modifying T.R.O.

6/30/75 H. Hearing Latchum J. re deft's. motion to modify T.R.O. Order to be issued.

6/30/75 #32 Pltfs. GTE Sylvania and Aeronutronic's notice and motion to have affidavit of Richard L. Sanderson (paper #25) remain under seal. SO ORDERED Latchum J. (Counsel present)

7/1/75 #33 Magnavox's response to defts'. motion for order modifying T.R.O.

7/7/75 #34 RCA's notice of filing proposed order and proposed order re defts'. motion to modify T.R.O.

7/8/75 #35 Sealed envelope containing Govt's. motion for summary judgment, opposition to pltf's. motion for prelim. injunc., cert. copy of adminis. record, memo. in support of deft's. motion for summary judgment & opposition to motion for prelim. injunc. appendix thereto, affidavit of Constance B. Newman, affidavit Sheldon Butts.

DATE	NR.	PROCEEDINGS

7/11/75 Order on paper #34 signed 7/11/75 Latchum J. (Notice to counsel Mr. Moore.)

7/15/75 #38 Lg. sealed envelope w/exhibits of and deposition of Robert Northedge, Consumer Products Safety Comm.—2 vol. 5/29/75 and 5/30/75.

7/18/75 #40 Joint memo. of GTE Sylvania and Aeronutronic Ford in opposition to defts'. motion for summary judgment & reply to defts'. memo. in opposition to pltfs'. motion for prelim. injunc.

7/18/75 #41 Sealed envelope containing Exhibit P-2 to deposition of Robert Northridge.

7/23/75 H. Hearing Latchum J. re deft's motion for prelim. injunc. Decision CAV.

10/23/75 #43 OPINION Latchum J. (Notice and copies to counsel.)

10/23/75 #44 ORDER Latchum J. issuing prelim. injunc. enjoining deft. from disclosing information (Notice and copies to counsel.)

12/19/75 #45 Govt's. notice of appeal.

1/19/76 E. Exit complete record on appeal to Clerk 3rd CCA. (Notice to counsel.)

1/30/76 #46 Stipln. and ORDER Latchum J. sub. Matsushita Electric Corp. of America, a Delaware Corp. as party pltf. in place of Matsushita Elec. Corp. of America, a N.Y. Corp. (Notice to counsel.)

5/10/76 #47 Cert. copy from Clerk 3rd CCA order granting dismissal of appeal.

8/20/76 #49 ORDER Latchum J. Clerk to close this case for statistical purposes; not to be considered dismissal any part may initiate further proceedings if necessary (Notice and copies to counsel by Court.)

7/11/77 C. Conf. Latchum J. re status.

DATE	NR.	PROCEEDINGS
7/13/77	#51	Pltfs'. motion for perm. injunc.
7/15/77	#52	ORDER Latchum J. setting trial 9/12/77; pretrial 9/2/77 at 11 a.m.; discover complete by 8/26/77. (Notice and copies to counsel.)
7/29/77	#53	Defts'. notice and motion to vacate order fixing pretrial conf. and trial w/proposed order.
7/29/77	#54	Defts'. memo. in support of motion to vacate.
7/29/77	#55	Defts'. motion to transfer to Dist. of Columbia w/proposed order.
7/29/77	#56	Defts'. memo. in support of motion to transfer.
8/1/77	#57	Defts'. memo. in opposition to motions for perm. injunction.
8/2/77	#59	ORDER Latchum Ch. J. requiring Briefing and/or affidavit scheduled (notice & copies to counsel)
8/4/77	#60	Pltf's. Memorandum in opposition to Deft's. Motion to vacate order fixing pretrial conference and Trial.
8/4/77	#61	Pltf's. Memorandum in Opposition to Motion to Transfer.
8/5/77	#62	Pltf's. GE Memorandum in Opposition to Motion to vacate order fixing P/T & Trial.
8/5/77	#62A	Pltf. Gen. Elec. memorandum in opposition to Govt's motion to transfer.
8/8/77	#63	Pltf's. requests for admissions.
8/8/77	#64	Pltfs. GTE & Aeronutronic Ford Corp's notice & motion to shorten time within which defts. may have to respond to requests for admissions. W/proposed order thereon.
8/8/77	#65	Admiral Corp.'s joinder in memoranda.

DATE	NR.	PROCEEDINGS
8/8/77	#66	Warwick Electronics, Inc.'s opposition to motion to vacate order fixing P/T conf. and trial and to motion to transfer.
8/9/77	#67	Motorola, Inc.'s response to motion to transfer. (deft's motion)
8/9/77	#68	Teledyne Mid-America Corp's response to deft's. motion to transfer.
8/9/77	#69	Matsushita Electric Corp's response to deft's. motion to transfer.
8/9/77	#70	Sharp Electronics Corp's response to deft's. motion to transfer.
8/9/77	#71	Toshiba America, Inc.'s response to deft's. motion to transfer.
8/15/77	#73	Defts'. oppos. to pltfs. GTE Sylvania and Aeronutronic Ford's motion to shorten time.
8/15/77	#74	Defts'. notice of depos. of GTE Sylvania 8/22/77.
8/15/77	#75	Defts'. reply memo. to pltfs'. oppos. to defts'. motion to transfer.
8/15/77	#76	Defts'. reply memo. to pltfs'. oppos. to defts'. motion to vacate P/T Conf. & trial.
8/16/77	#77	Pltfs'. response to defts'. oppos. to motion to shorten time.
8/18/77	#78	ORDER Latchum J. setting arg. 9/2/77 at 11 a.m. (Notice and copies to counsel.)
8/22/77	#79	Govt's. motion to vacate prelim. injunc. w/proposed order.
8/22/77	#80	Govt's. motion for summary judgment w/affidavit of Constance B. Newman, Sheldon Butts.
8/22/77	#81	Govt's. memo. in support of defts'. motions to vacate orders, etc.

DATE	NR.	PROCEEDINGS

8/31/77 #85 Suppl. to defts'. motion to transfer w/attachments.

9/1/77 #86 Motion of GTE Sylvania and Aeronutronic Ford for summary judgment.

9/1/77 #88 Affidavit of James M. McHaney, Jr.

9/1/77 #89 Memo. of GTE and AERONUTRONIC in support of motion for summary judgment.

9/2/77 H. H. Latchum Ch J re pltfs. GTE & A-Ford's motions to shorten time on discovery and for summ. jdgt; & defts'. motions to transfer & to vacate Court's Order setting Trial Date. Dec. Granted motion to vacate trial date & pltf's motion to consolidate for trial purposes, CAV on motion to transfer & res dec on summ. jdgt.

9/6/77 #91 ORDER LATCHUM Ch J granting deft's vacating trial date, denying deft's. motion to shorten time, reserving dec. on motion to transfer & delaying dec. on GTE & A-Ford's motion for summ. jdgt; Consolidating the 12 cases for trial and all other purposes. (Notice & copy to counsel.)

9/8/77 #93 Defts'. response to pltfs'. GTE Sylvania and Aeronutronic Ford's rqsts./admission.

9/12/77 #94 Dist. of Columbia Court of Appeals stay of mandate.

9/12/77 #95 Motion of Warwick Electronics, Inc., for summary judgment, w/affidavit of Howard M. Berg and proposed order.

9/12/77 #96 Warwick's joinder in memo.

9/12/77 #98 Affidavit of James M. McHaney, Jr.

9/15/77 #100 Memo. OPINION Latchum J. (Notice and copies to counsel.)

9/15/77 #101 ORDER Latchum J. denying defts'. motion to transfer; motion and brief sch. set; arg. set 10/28/77 at 11 a.m. (Notice and copies to counsel.)

DATE	NR.	PROCEEDINGS

9/15/77 #102 Motion of Admiral Corp. for summary judgment.

9/21/77 #105 Motion of Motorola, for summary judgment.

9/21/77 #106 Motion of Matsushita Electric, Sharp Electronics and Toshiba for sum. judgment.

10/5/77 #107 Govt's. notice of intention to make public Harwood Report, "Analysis of Subpoenaed Television Date" 9/23/77.

10/7/77 #108 Suppl. state. in oppos. to deft's. motion to vacate prelim. injunc. & in oppos. defts. motion sum. jdgmnt. Sealed. (GTE and Aeronutronic Ford.)

10/7/77 #109 (GTE & Aeronutronic Ford) Pltf's. memo. in oppos. to defts'. motion to vacate prelim. injunc., etc.

10/7/77 #110 Affidav. of James M. McHaney, Jr.

10/7/77 #111 Defts'. memo. in oppos. to pltfs'. motion for summary jdgmnt.

10/7/77 #112 GE's memo. in oppos. to defts'. motion for sum. jdgmnt. and vacate prelim. injunc.

10/7/77 #113 Motorola, Sharp, Toshiba's memo. in oppos. to defts'. motion for sum. jdgmnt. and vacate prelim. injunc.

10/7/77 #114 Matsushita's memo. in oppos. to defts'. motion for sum. judgment.

10/17/77 #115 Certain pltfs'. response to defts'. Notice to the Court re Harwood report.

10/21/77 #118 Defts'. reply to pltfs'. oppos. to motions to vacate orders prelim. injunc. & motion for summary judgment.

10/21/77 #119 GTE's reply memo. to defts'. oppos. to motions for sum. jdgmnt.

10/21/77 #120 Pltf. General Elec.'s reply to defts'. oppos. to motion for sum. jdgmnt.

DATE	NR.	PROCEEDINGS

10/21/77 #121 RCA's reply memo. to defts'. oppos. to motions for sum. jdgmnt.

10/27/77 #123 GE's rqst. for leave to file response to defts'. reply. w/response.

10/28/77 H Hearing Latchum J. re cross-motions for sum. jdgmnt. CAV.

12/8/77 #125 OPINION LATCHUM Ch J. (Notice & copies to counsel).

12/8/77 #126 JUDGMENT & PERMANENT INJUNCTION LATCHUM Ch J ordered that summary judgment is entered in favor of pltf's and against the defts., Deft's motion to vacate the outstanding prelim. injunction & for summary judgment is denied; defts its members etc are enjoined from disclosing to the public certain information pertaining to safety standards. (Notice & copies to counsel w/extra copies for US Atty Gen.)

12/19/77 #127 Govt's. notice and motion to alter/amend jdgmnt; proposed order.

12/19/77 #128 Govt's. memo. in support of motion to alter/amend jdgmnt.

12/22/77 #129 ORDER Latchum J. denying defts'. motion to alter or amend judgment. (Notice and copies to counsel.)

2/9/78 #130 At 3:59 P.M. notice of APPEAL filed by defts.

3/13/78 E Exit record on appeal to Clerk 3rd CCA. (notice to counsel.)

4/30/75 #1 Complaint. Summons issued. (Exit to Marshal.)

4/30/75 #2 Pltf's. notice and motion for preliminary injunction.

4/30/75 #3 Pltf's. application for temporary restraining order.

DATE	NR.	PROCEEDINGS

4/30/75 H Hearing Stapleton J. re T.R.O. GRANTED.

5/1/75 #5 Notice of Assignment of J. (Latchum). Notice to Counsel.

5/14/75 C Conf. Latchum J. Arg. 7/16/75 at 11 a.m.

5/29/75 #6 Order Latchum J. consolidating cases CA 75-104, 108, 112, 113, 114, 115, 116, 122, 131 & 135, 136 for discovery, brief sch. etc. Arg. July 23 '75 at 11:00 AM.

5/29/75 #7 ANSWER.

4/30/75 #1 Verified complaint. Summons issued. (Exit writ to Marshal.)

4/30/75 #2 Application by pltf. for T.R.O.

4/30/75 #3 Pltf's. application for preliminary injunction.

4/30/75 H Hearing Stapleton J. re T.R.O. GRANTED.

5/1/75 #5 Notice of Assignment of J. (Latchum). Notice to Counsel.

5/14/75 C Conf. Latchum J. Arg. 7/16/75 11 a.m.

5/29/75 #6 Order Latchum — consolidating cases CA 75-104, 108, 112, 113, 114, 115, 116, 122, 131 & 136 for discovery, brief sch, etc. Arg. July 23 '75 at 11:00 AM.

5/29/75 #7 ANSWER

5/29/75 #1 Certified copy of consent ORDER Knapp J of transfer from S.D. of New York; with letter Deputy Clerk copy of docket entries & civil cover sheet.

/ /75 #2 VERIFIED COMPLAINT.

/ /75 # 4 CONSENT ORDER KNAPP J that deft's are restrained & enjoined for a period of (60) days from date of this order.

5/29/75 #5 Pltf's notice & motion for a preliminary injuction.

5/30/75 #6 ANSWER.

DATE	NR.	PROCEEDINGS

6/5/75 #9 Notice of Assignment of J. (Latchum). Notice to Counsel.

6/25/75 #20 ORDER Latchum J. that restraining order entered herein by N.Y. Court shall remain in effect until further order of this Court. (Notice and copies to counsel.)

6/25/75 #21 ORDER Latchum J. consolidating this case w/75-104, 108, 112, 113, 114, 115, 116, 122, 131, 136, 150 and 152; to captioned In re: Consumer Product Safety Commission Litigation; terms of aforesaid Order re presentation of Motions for Prelim. Injunction to be binding. (Notice and copies to counsel by Court.)

/ /75 #1 Certified copy of Consent ORDER KNAPP J of transfer from S.D. of New York; with letter deputy clerk, copy of docket entries and civil cover sheet.

/ /75 #2 COMPLAINT.

/ /75 #4 CONSENT ORDER KNAPP J that defts are restrained & enjoined for a period of (60) days from date of this order etc.

/ /75 #5 Pltf's notice & motion for a preliminary injunction.

/ /75 #7 ANSWER

/ /75 #8 ORDER Latchum J. consolidating this action with 75-104, 108, 112, 113, 114, 115, 116, 122, 131, 136, and 150 as per order 5/29/75. (Notice to counsel.)

/ /75 #9 Notice of Assignment of J. (Latchum). Notice to Counsel.

/11/75 #10 ORDER Latchum J. that restraining order entered herein by N.Y. Court remain in effect until plft's. motion for prelim. injunction is determined or until further Order of the Court. (Notice and copies to counsel.)

DATE	NR.	PROCEEDINGS

/16/75 #1 Certified copy ORDER Foley J. of transfer from Northern Dist. of N. Y.; temporary restraining ORDER Foley J.; ORDER Foley J. to show cause; affidavit of Fred R. Wellner; application for order to show cause & temporary restraining order.

/16/75 #2 Verified complaint for injunction & declaratory judgment.

/20/75 #4 Notice of Assignment of J. (Latchum). Notice to Counsel.

/29/75 #5 Order Latchum J. consolidating cases CA 75-104, 108, 112, 113, 114, 115, 116, 122, 131 & 136 for discovery, brief sch. etc. July 23 '75 at 11:00.

/29/75 #6 ANSWER

/13/75 #1 Complaint for preliminary and permanent injunction, declaratory judgment and application for temporary restraining order, w/affidavit of Robert F. Stewart, Pres. Admiral Corp., and/ORDER Snyder J. granting temporary restraining order.

/13/75 #3 Consent ORDER Snyder J. transferring this action to Dist. of Dela.

3/13/75 #4 Notice of Assignment of J. (Latchum). Notice to Counsel.

5/14/75 C. Conf. Latchum J. Arg. set 7/16/75 at 11 a.m.

5/29/75 #5 Order Latchum J. consolidating cases CA 75-104, 108, 112, 113, 114, 115, 116, 122, 131 & 136 for discovery, brief sch. etc. Arg. July 23 '75 at 11:00.

5/29/75 #6 ANSWER

/29/75 #1 Certified copy ORDER ON CONSENT KNAPP J of transfer from S.D. of New York; with letter of Deputy clerk, copy of docket entries & civil cover sheet.

/ / #2 VERIFIED COMPLAINT.

DATE	NR.	PROCEEDINGS
/ /	#4	Pltf's notice & motion for a preliminary injunction.
5/29/75	#5	Consent ORDER KNAPP J temporary restraining deft's & enjoined for a period of (60) days from the date of this order or the date of determination of pltf's motion for a preliminary injunction.
5/30/75	#7	ANSWER.
6/5/78	#8	ORDER Latchum J. consolidating this action with 75-104, 108, 112, 113, 114, 115, 116, 122, 131 and 136 as per Order 5/29/75. (Notice to counsel.)
6/5/75	#9	ORDER Latchum J. that restraining order entered by N.Y. Court shall remain in effect until this Court has determined pltf's. motion for prelim. injunction or until further order of this Court. (Notice to counsel.)
6/5/75	#10	Notice of Assignment of J. (Latchum). Notice to Counsel.
/30/75	#1	Complaint. Summons issued. (Exit writ to Marshal.)
/30/75	#2	Pltf's. motion for preliminary injunction.
/30/75	#3	Pltf's. notice and motion for T.R.O.
/30/75	#4	Affidavit of Joseph R. Haack in support of motion for T.R.O. and Prelim. Injunction.
/30/75	H	Hearing Stapleton J. re T.R.O. GRANTED.
/1/75	#6	Notice of Assignment of J. (Latchum). Notice to Counsel.
/14/75	C	Conf. Latchum J. Arg. 7/16/75 at 11 a.m.
/29/75	#7	ORDER LATCHUM J consolidating cases CA 75-104, 108, 112, 113, 114, 115, 116, 122, 131 & 136 for discovery brief sch etc. Arg. July 23 '75 at 11:00 am. (Notice to counsel)
/29/75	#8	ANSWER.

DATE	NR.	PROCEEDINGS
/28/75	#1	Complaint. Summons issued. (Exit writ to Marshal's office).
/28/75	#2	Application for T.R.O.
/28/75	#3	Notice and motion for preliminary injunction.
/19/75	C	Conf. Stapleton J. re T.R.O.
/29/75	#5	Temporary Restraining Order Stapleton J. (Service by Marshal)
/29/75	#6	Pltf's. suppl. affidavit in support of pltf's application for T.R.O. and motion for preliminary injunction. (Affidavit of Philip Curtis, Esq.)
/13/75	#7	Notice of Assignment of J. (Latchum). Notice to Counsel.
/14/75	C	Conf. Latchum J. Arg. 7/16/75 at 11 a.m.
/29/75	#9	ORDER LATCHUM J consolidating cases CA 75-104, 108, 112, 113, 114, 115, 116, 122, 131 & 136 for discovery, brief, etc. Arg. July 23 '75 at 11:00 AM. (Notice to counsel)
/29/75	#10	ANSWER.
/22/75	#1	Complaint. Summons issued. (Exit writ to Marshal.)
/22/75	#2	Pltf's. motion for preliminary injunction, w/proposed order for hearing on prelim. injunction.
/23/75	H	Hearing Latchum J. re T.R.O. Granted.
/24/75	#4	Notice of Assignment of J. (Latchum). Notice to Counsel.
/14/75	C	Conf. Latchum J. Arg. 7/16/75 at 11 a.m.
/19/75	#6	ORDER LATCHUM Ch J consolidating the following cases C.A. 75-104, 108, 112, 113, 114, 115, 116, 122, 131 & 136 for discovery, briefs, etc. Arg. set Jul 23 '75 11:00 AM (Notice to counsel).

DATE	NR.	PROCEEDINGS
/29/75	#7	ANSWER.
/25/75	#1	Complaint. Summons issue. (Exit papers to Marshal.)
/25/75	#2	Pltf's. application for T.R.O.
/25/75	#4	Pltf's. notice and motion for preliminary injunction.
/25/75	#5	Affidavit of Samuel J. Rozel in support of motion for preliminary injunction or, in alternative, a temporary restraining order.
4/25/75	H	Hearing Latchum J. re T.R.O. GRANTED. (service of all papers to be made by US Marshal.
/13/75	#6	Notice of Assignment of J. (Latchum). Notice to Counsel.
/14/75	C	Conf. Latchum J. Arg. 7/16/75 11 a.m.
/29/75	#7	ORDER LATCHUM J consolidating cases C.A. 75-104, 108, 112, 113, 114, 115, 116, 122, 131, 136 for discovery, briefs, etc. Arg. set July 23 '75 at 11:00 am. (Notice to counsel)
/29/75	#8	ANSWER.

DATE	FILINGS—PROCEEDINGS
1978	
Mar. 21	Copy of Notice of Appeal, received February 15, 1978, filed.
	Record in D. C. Civil No. 75-104, received March 15, 1978, filed. [ENTIRE RECORD IN EXHIBIT ROOM] [PAPERS NO. 13, 15, 16, 17, 18, 19, 24, 25, 26, 29, 35, 38, 41, 103, 104 & 108 "SEALED" IN U.S.C.A. SAFE].
	Record in D. C. Civil No. 75-108, received March 15, 1978, filed. [ENTIRE RECORD IN EXHIBIT ROOM] [PAPERS NO. 9, 11, 12, 13, 14, 15, 16, 23, 29, 79 & 82 "SEALED" IN U.S.C.A. SAFE].
	Record in D. C. Civil No. 75-114, received March 15, 1978, filed. [ENTIRE RECORD IN EXHIBIT ROOM] [PAPERS No. 10, 12, 13, 14, 15, 16, 22, 27, 29, 66 & 76 "SEALED" IN U.S.C.A. SAFE].
	Record in D. C. Civil No. 75-115, received March 15, 1978, filed. [ENTIRE RECORD IN EXHIBIT ROOM] [PAPERS NO. 9, 11, 12, 13, 14, 15, 21, 26, 68 & 72 "SEALED" IN U.S.C.A. SAFE].
	Record in D. C. Civil No. 75-116, received March 15, 1978, filed. [ENTIRE RECORD IN EXHIBIT ROOM] [PAPERS NO. 9, 11, 12, 13, 14, 15, 20, 21, 22, 25, 31, 88, & 92 "SEALED" IN U.S.C.A. SAFE].
	Record in D. C. Civil No. 75-131, received March 15, 1978, filed. [ENTIRE RECORD IN EXHIBIT ROOM] [PAPERS NO. 9, 13, 14, 15, 16, 17, 22, 27, 73 & 75 "SEALED" IN U.S.C.A. SAFE].
	Record in D. C. Civil No. 75-136, received March 15, 1978, filed. [ENTIRE RECORD IN EXHIBIT ROOM] [PAPERS NO. 9, 11, 12, 13, 14, 15, 16, 21, 26, 28, 77 & 80 "SEALED" IN U.S.C.A. SAFE].

DATE	FILINGS—PROCEEDINGS

1978

Record in D. C. Civil No. 75-150, received March 15, 1978, filed. [ENTIRE RECORD IN EXHIBIT ROOM] [PAPERS NO. 11, 13, 14, 15, 16, 17, 22, 27, 28, 71 & 73 "SEALED" IN U.S.C.A. SAFE].

Record in D. C. Civil No. 75-151, received March 15, 1978, filed. [ENTIRE RECORD IN EXHIBIT ROOM] [PAPERS NO. 10, 12, 13, 14, 15, 16, 23, 28, 71 & 73 "SEALED" IN U.S.C.A. SAFE].

Record in D. C. Civil No. 75-152, received March 15, 1978, filed. [ENTIRE RECORD IN EXHIBIT ROOM] [PAPERS NO. 11, 13, 14, 15, 16, 17, 23, 28, 73 & 74 "SEALED" IN U.S.C.A. SAFE].

Record in D. C. Civil No. 75-112, received March 15, 1978, filed. [ENTIRE RECORD IN EXHIBIT ROOM] [PAPERS NO. 10, 12, 13, 14, 15, 16, 22, 27 & 79 "SEALED" IN U.S.C.A. SAFE]

Record in D. C. Civil No. 75-113, received March 15, 1978, filed. [ENTIRE RECORD IN EXHIBIT ROOM] [PAPERS NO. 12, 14, 15, 16, 17, 18, 25, 30, 78 & 83 "SEALED" IN U.S.C.A. SAFE].

May 3 Order (*Clerk*) granting appellant's motion for leave to extend time to file brief and the appendix to May 31, 1978, with NO FURTHER EXTENSIONS, filed.

May 31 Brief for appellants, rec'd. June 5, 1978, filed. (25 cc.). Certificate of service by mail on May 31, 1978 appears on Pages 37, 38 and 39.

May 31 Appendix (Vols. I, II & III), rec'd June 5, 1978, filed. (10 cc.). VOL. III HELD IN U.S.C.A. SAFE pending disposition of motion to impound that volume only. See order 6. Motion granted.

DATE	FILINGS—PROCEEDINGS

1978

June 5 Order (*Seitz*, Ch.J. and Gibbons, C.J.) granting motions of Consumers Union of the United States, Inc., Consumer Federation of America and Public Citizen's Health Research Group for leave to file briefs amici curiae; and denying the motions for other relief with respect to the schedule of briefing of the parties, without prejudice to further application to the panel to whom the case is referred on the merits, filed.

June 5 Brief for amici curiae, Consumers Union of the United States, Inc., and Public Citizen Health Research Group, rec'd May 3, 1978, filed. Service attached.

June 5 Brief for amicus curiae, Consumer Federation of America, rec'd June 2, 1978, filed. Service attached.

June 14 Order (*Clerk*) granting appellants' motion for leave to file Volume III of the appendix under seal, filed.

July 7 Letter by Clerk, dated July 7, 1978 to Irving R. Segal, Esq., counsel for appellees RCA Corporation, et al. granting request for reconsideration and granting extension of time for filing appellees brief to not later than August 14, 1978.

July 7 Letter by Clerk, dated July 7, 1978 to Harry L. Shniderman, Esq. and James M. McHaney, Jr., Esq., counsel for appellees GTE Sylvania, et al. advising that 40 day instead of 30 days extension of time granted to appellees RCA, et al. with brief to be filed not later than August 14, 1978 and advising that brief for appellees GTE Sylvania, et al. to be filed and served not later than August 14, 1978.

July 24 Order (*Weis* and Higginbotham, C.J.) granting request by appellee, Aeronutronic Ford Corporation to amend caption to reflect change of said appellee's name to *Ford* Aerospace & Communications Corporation, filed.

DATE	FILINGS—PROCEEDINGS

1978

Aug. 11 Brief for appellees, GTE Sylvania Inc. and Ford Aerospace & Communications Corp., received August 14, 1978, filed. Service by mail on 8/11/78 attached.

Aug. 14 Brief for appellees, RCA Corporation, General Electric Co., The Magnavox Co., Zenith Radio Corp., Motorola, Inc., Warwick Electronics, Inc., Matsushita Electric Corp. of America, Admiral Corp., Sharp Electronics Corp. and Toshiba America, Inc., filed Certificate of service by mail on August 14, 1978 on last page of brief.

Aug. 28 Consent motion by appellant for a 30-day extension of time to file reply brief to October 2, 1978, filed. (4cc) Service attached.

Sept. 5 Above consent motion acted on as follows: Extension granted to September 28, 1978. *No further extensions.* Acting Clerk.

Sept. 28 Reply brief for appellants, received October 2, 1978, filed. Service by mail on 9/28/78 attached.

Oct. 13 Order (Clerk) denying appellant's motion to expedite oral argument as unnecessary, in light of the fact that this case will be listed at the earliest convenience of the Court because it involves the granting of injunctive relief, filed.

Dec. 21 Letter dated December 18, 1978 from Mark N. Mutterperl, Esq., counsel for appellant, enclosing copy of Second Circuit opinion in *Pierce & Stevens Chemical Corp.* v. *United States Consumer Product Safety Commission,* received for the information of the Court.

Dec. 28 Order dated December 27, 1978 (Seitz, Ch.J.) directing 30 minutes for appellant, 15 minutes for amicus curiae and 45 minutes for appellees, filed.

DATE	FILINGS—PROCEEDINGS

1979

Jan. 8 Argued. Coram: Seitz, Ch.J., Gibbons and Higginbotham, C.J.

Feb. 2 Transcript of the oral argument in this Court on January 8, 1979, received at the direction of the Court, filed. (4cc)

Apr. 30 Opinion of the Court (*Seitz,* Ch.J. and Gibbons and Higginbotham, C.J.), filed.

Apr. 30 Judgment affirming in its entirety the judgment of the district court, filed December 8, 1977, with costs taxed against appellant, filed.

May 11 Order (*Seitz,* Ch. J. and Gibbons and Higginbotham, C.J.) amending opinion, filed.

May 22 Certified judgment in lieu of formal mandate issued.

May 22 Records (separate in each Civil No. 75-104, 75-108, 75-112, 75-113, 75-114, 75-115, 75-116, 75-131, 75-136, 75-150, 75-151 and 75-152) returned to Clerk of DC.

May 24 Receipt for records (separate in each Civil No. 7-104, 75-108, 75-112, 75-113, 75-114, 75-115, 75-116, 75-131, 75-136, 75-150, 75-151 and 75-152) rec'd from Clerk of DC., filed.

July 25 Copy of letter dated July 23, 1979 to counsel for appellant advising that Supreme Court extended time for filing petition for writ of certiorari to and including August 28, 1979, received from Clerk of S.C.

Aug. 24 Copy of letter dated August 22, 1979 to counsel for appellant advising that Supreme Court extended time for filing petition for writ of certiorari to and including September 27, 1979, received from Clerk of S.C.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Civil Action No.

GTE SYLVANIA INCORPORATED, PLAINTIFF

v.

CONSUMER PRODUCT SAFETY COMMISSION, RICHARD O. SIMPSON, individually and in his capacity as Chairman of Consumer Product Safety Commission, BARBARA FRANKLIN, individually and in her capacity as a Commissioner of Consumer Product Safety Commission, LAWRENCE KUSHNER, individually and in his capacity as a Commissioner of Consumer Product Safety Commission, CONSTANCE NEWMAN, individually and in her capacity as a Commissioner of Consumer Product Safety Commission, R. DAVID PITTLE, individually and in his capacity as a Commissioner of Consumer Product Safety Commission, SADYE DUNN, individually and in her capacity as Secretary of Consumer Product Safety Commission, and VINCE DE LUISE, individually and in his capacity as Freedom of Information Officer for Consumer Product Safety Commission, DEFENDANTS

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

1. Plaintiff, GTE Sylvania Incorporated ("Sylvania"), is a corporation organized and existing under the laws of the State of Delaware.

2. Defendant, Consumer Product Safety Commission (the "Commission"), is an independent regulatory commission established pursuant to the Consumer Product Safety Act of 1972, 15 U.S.C. §§ 2051 *et seq.*

3. Defendants, Richard O. Simpson, Barbara Franklin, Lawrence Kushner, Constance Newman, R. David Pittle, Sadye Dunn, and Vince de Luise, are each members or employees of the Commission.

4. This court has jurisdiction of the subject matter of this Complaint pursuant to 5 U.S.C. §§ 702 and 704, 28 U.S.C. §§ 1331 and 1337, and 28 U.S.C. §§ 2201-2202.

COUNT ONE

5. On Friday, April 11, 1975, a letter dated April 8, 1975, was received at Sylvania's office in Batavia, New York, giving notice that the Commission had made a final decision to release accident and technical data which Sylvania submitted in response to a Special Order issued by the Commission on May 13, 1974, and additional data submitted in response to a subpoena *duces tecum* issued by the Commission on July 26, 1974.

6. By letter dated May 13, 1974, supplementing an earlier request for information in connection with public hearings on television safety, held on April 23 and 24, 1974, the Commission issued a Special Order to Sylvania and other manufacturers of television sets or components, requesting the submission of television-related accident data collected since 1969 hearings held by the National Commission on Product Safety, as well as certain technical and policy information concerning the present and future safety-related matters. A copy of the Commission's letter of May 13, 1974 together with its enclosure, the Commission's Special Order, are attached hereto as Exhibit A. In this letter, Defendant Simpson, Chairman of the Commission, gave express assurances that "This information will be received in confidence." In addition, Mr. Simpson stated that, in the event a demand were made by a third party under the Freedom of Information Act for disclosure of data submitted pursuant to assurances of confidentiality, the Commission would release the data only if it determined that "the most recent judicial interpretation" required disclosure. Finally, upon receipt of a disclosure request Sylvania "will be informed and given the opportunity to present additional information and views regarding the exempt status of the materials."

7. By letter dated May 28, 1974 to the Secretary of the Commission, Sylvania's attorney responded to the

Commission's "Special Order" by submitting certain data. Pursuant to the Chairman's written assurance of confidentiality, a specific request for confidential treatment of certain parts of the submission was made. This letter is attached hereto as Exhibit B.

8. Under a covering letter dated July 26, 1974, the Commission issued a subpoena *duces tecum* directing Sylvania to provide certain supplementary accident and technical data, "[t]o assist the Consumer Product Safety Commission in its investigation of shock and fire hazards associated with television receivers." A copy of the subpoena *duces tecum*, with covering letter and attachments are attached hereto as Exhibit C. Attached to the Commission's *duces tecum* was a sample accident report form referred to by the Commission for the purpose of illustrating the type of accident report the subpoena was intended to cover. This sample form made clear that the subpoena of the Commission sought documentation pertaining not just to actual, verified accidents, but also to "alleged incidents."

9. Sylvania submitted its response to the Commission's subpoena *duces tecum* on August 23, 1974. Counsel for Sylvania stated in a cover letter that Sylvania was submitting the documents "to be included in and treated as a part of [the Commission's] investigatory files in its television receiver fire and shock hazards investigation." The letter further stated that the material was of a proprietary nature, specifically referring to accident reports and "alleged incident" data, and requested that the documents be afforded confidential treatment "in accordance with the provisions of 5 U.S.C. Sections 552(b)(4) and (b)(7)." This letter is attached hereto as Exhibit D.

10. The materials submitted by Sylvania include all reports of incidents *allegedly* involving equipment failure. In reality many of these *alleged* incidents were not accidents resulting from equipment failure but rather reflect proper equipment functioning or equipment misuse. However, because the Commission's subpoena appeared to request production of all safety-related incident reports, all of this material was forwarded to the Commission.

11. By letter dated August 2, 1974, Defendant Dunn, Secretary of the Commission, notified Sylvania that the Commission had received requests from the Health Research Group and from Consumers Union for disclosure of the information submitted in response to the Commission's Special Order of May 13, 1974. The Secretary's letter requested that Sylvania substantiate any claim for confidentiality which it might have for any data submitted to the Commission voluntarily, in response to the Special Order, or in response to the Commission's subpoena issued July 26, 1974. The Secretary then stated,

> "When our review is complete and prior to any disclosure of material claimed to be confidential, we will inform you which materials we consider to be discloseable notwithstanding your claim. At that time you will have an opportunity to determine whether or not you desire to appeal from this initial determination."

The Secretary's letter of August 2, 1974, together with its enclosures, is attached hereto as Exhibit E.

12. By letter dated August 29, 1974, Sylvania replied to the Secretary's request for claims and substantiation. This reply is attached hereto as Exhibit F. In this letter, Sylvania went into detail with respect to its basis for requesting confidential treatment for all television related accident/incident data, trade secrets, documents and data relating to product safety and reliability, and documents concerning product-related claims against Sylvania and product-related litigation files, submitted to the Commission pursuant to the Special Order and subpoena *duces tecum*. No further correspondence on this matter was received from the Commission until April 11, 1975.

13. Sylvania has never been notified by the Commission formally or informally, that any request has been filed with the Commission requesting disclosure of data submitted in response to the Commission's subpoena *duces tecum*. On information and belief, no such request for disclosure has been filed.

14. By letter dated April 8, 1975, which together with its enclosure is attached hereto as Exhibit G, Defendant De Luise, the Commission's Freedom of Information Officer, formally notified Sylvania of the Commission's *final* decision to release accident and technical data which Sylvania submitted in response to the Commission's Special Order and the Commission's subpoena. The letter states that the Commission had decided to release all accident and technical data submitted by Sylvania with the exception of (1) privileged legal correspondence, (2) accident data containing identifying details which might infringe the victim's personal privacy, and (3) certain unspecified technical data. The letter generally asserts that "accident data" is not "commercial information" within the meaning of the exemption provisions of section 552(b)(4) of the Freedom of Information Act. The letter also states that even if the information were within the statutory exception, the Commission had decided that it should be released "in the interest of the public health and safety."

15. On February 7, 1975, the Commission awarded a contract to a private company to produce a "computer extraction" of the accident/incident data submitted to the Commission by Sylvania and other manufacturers of television sets and components. Upon information and belief, this contractor completed this "computer extraction" around the end of March, 1975, and the "computer extraction," which identifies Sylvania, represents a portion of the data which the Commission intends to disclose.

16. While Sylvania has been able to obtain a copy of the "computer extraction" of Sylvania data, the Commission has not provided a description of the methodology used in its preparation. Consequently, given the present format of the "computer extraction," it is impossible for Sylvania to verify whether the statistical presentation contained in the "computer extraction" is accurate. Moreover, on information and belief, the Commission does not intend independently to verify the accuracy of this "computer extraction" before disclosing it to the public.

17. The computer extraction is styled "TV Accident Reports—Sequence Listing." This title takes no account of the fact that much of the data submitted in response to the Commission's request for reports of *alleged* accidents almost certainly reflects accidents resulting from causes other than equipment failure. However, the Commission has made no investigation to verify which of the "accidents" to be disclosed actually resulted from equipment failure. Consequently disclosure of this data in its present format will in effect represent to the public that *all* of the data submitted by Sylvania reflects actual, verified accidents, which is not the case.

18. The Freedom of Information Officer's letter of April 8, 1975, provided that the data would not be released for at least ten days after receipt of the notice. As authority for its ten-day release delay, the letter referred to the Commission's "Interim Freedom of Information Guidelines (16 CFR, Part 1015)." In fact, the Commission's "Interim Guidelines" are not part of the Code of Federal Regulations. The Commission has published a notice of proposed rules in the Federal Register, but the rules have not beer formally adopted by the Commission and have not been published as rules in the Federal Register. The Commission has adopted no other Rules governing the disposition of disclosure requests made pursuant to the Freedom of Information Act, 5 U.S.C. § 552.

19. As a "more complete discussion of the Commission's reasons for disclosing these data," the Freedom of Information Officer provided to Sylvania as an enclosure to his letter of April 8, 1975, (Exhibit G) a memorandum from the Commission's Office of General Counsel. The Freedom of Information Officer asserted that this memorandum "formed the basis for the Commission's decision." *See* Exhibit G. This memorandum discloses that the Commission intends to release data supplied by all other manufacturers in connection with the Commission's investigation. In addition the memorandum, on page 7, "recognizes" that release of the data as presently proposed would result in a distorted presentation of the relative accident rates of different manufacturers:

> "some television manufacturers have apparently been more conscientious in compiling accident data than others and thus, the release of the accident data might be misleading in some cases, *i.e.*, a higher accident rate for one particular TV model than similar models because more complete records were maintained."

20. On April 17, 1975, counsel for Sylvania was advised informally by the General Counsel of the Commission that, in response to a request by another manufacturer, the Commission had decided to postpone the scheduled disclosure of data submitted by Sylvania and other manufacturers, as well as the "computer extraction" based upon this data, until May 1, 1975. On April 18, 1975, counsel for Sylvania received formal telegraphic notice from the Secretary of the Commission that disclosure was to be postponed until May 2, 1975. A copy of this telegram is attached hereto as Exhibit H.

21. In accordance with a recommendation contained in the staff memorandum submitted to the Commission, the Freedom of Information Officer's April 8 letter states that the problem of distortion posed by the disclosure of the data in its present form will be resolved as follows:

> the Commission will accompany release of the accident data with a statement that the information could be misleading because some television manufacturers maintained more complete accident records than other manufacturers.

However such a statement would plainly be insufficient to cure the misleading character of the disclosure now contemplated in that: such a statement would not identify those manufacturers whose accident figures are inflated; nor would such a statement inform the public of the extent to which accident data for particular manufacturers is inflated relative to other manufacturers whose submissions were less comprehensive.

22. The basis for the Commission's decision that Sylvania's data "should be released in the interest of public health and safety," as set forth in the Freedom of Information Officer's letter of April 8, is identified on page 5 of the attached staff memorandum: "the release of the accident data would assist consumers to better evaluate the safety of TVs." However, due to the concededly misleading nature of the disclosure the Commission now intends to make, disclosure would not in fact provide an accurate basis for comparative consumer decisions. On the contrary, such disclosure could well mislead the public into the selection of relatively less safe equipment.

23. The only official description of the data to be released is contained in the letter of April 8, 1975. However this letter does not provide Sylvania with adequate notice of the data which the Commission intends to disclose. It merely states that the Commission has decided to release all of the data with three vague and unspecified exceptions. Moreover, the letter does not identify the "computer extraction" as a portion of the proposed disclosure. Sylvania informally learned only several days after receiving the April 8 letter of the Commission's intention to disclose this "computer extraction." No opportunity whatever has been provided to Sylvania to submit comments to the Commission on its proposed release of this "computer extraction."

24. Despite the representation of the Commission that Sylvania would have an opportunity to determine whether or not to appeal to the Commission from an "initial determination" to disclose data submitted by Sylvania, the Commission's "Interim Guidelines" do not provide any method for appeal of an "initial determination" to disclose data provided to the Commission in confidence. In fact, Sylvania has not been provided an opportunity to appeal to the Commission from the initial determination of the Staff that Sylvania's confidential data should be disclosed.

25. Disclosure by Defendants of all or any portion of the data provided in confidence to the Commission by Sylvania and by other manufacturers of television sets or components is prohibited by the Consumer Product Safety Act, 15 U.S.C. § 2055(b)(1), which requires that the Commission shall assure that information to be disclosed shall be accurate and that disclosure be fair in the

circumstances and reasonably related to effectuating the purposes of the Act.

COUNT TWO

26. Sylvania realleges and incorporates by reference paragraphs 1 through 24 of Count One of this Complaint.

27. Disclosure by Defendants of all or any portion of the data provided in confidence to the Commission by Sylvania and by other manufacturers of television sets or components, in face of the Commission's concession that release of such data would be misleading, would be an arbitrary and capricious exercise of Defendants' authority and an unlawful abuse of agency discretion.

COUNT THREE

28. Sylvania realleges and incorporates by reference paragraphs 1 through 24 of Count One of this Complaint.

29. Disclosure by Defendants of all or any portion of the data provided by Sylvania to the Commission in confidence on the ground that disclosure is required by the Freedom of Information Act, would constitute an arbitrary and capricious exercise of Defendants' authority and an unlawful abuse of agency discretion because the data provided in confidence to the Commission by Sylvania is exempted from disclosure under the Freedom of Information Act by 5 U.S.C. § 552(b) (4).

COUNT FOUR

30. Sylvania realleges and incorporates by reference paragraphs 1 through 24 of Count One of this Complaint.

31. Disclosure by Defendants of all or any portion of the data provided by Sylvania to the Commission in confidence on the ground that disclosure is required by the Freedom of Information Act, would constitute an arbitrary and capricious exercise of Defendants' authority and an unlawful abuse of agency discretion because the data provided in confidence to the Commission by Sylvania is exempted from disclosure under the Freedom of Information Act by 5 U.S.C. § 552(b) (7).

COUNT FIVE

32. Sylvania realleges and incorporates by reference paragraphs 1 through 24 of Count One of this Complaint.

33. Disclosure by Defendants of all or any portion of the data provided by Sylvania to the Commission in confidence is expressly prohibited by 18 U.S.C. § 1905.

COUNT SIX

34. Sylvania realleges and incorporates by reference paragraphs 1 through 24 of Count One of this Complaint.

35. Disclosure by the Defendants of all or any portion of the data submitted to the Commission in confidence by Sylvania would be an arbitrary and capricious exercise of Defendants' authority and an unlawful abuse of agency discretion in that the Commission has failed to observe binding procedural requirements adopted by the Commission in connection with Sylvania's submission of data that require that an initial determination as to disclosure be made and that, prior to issuance of a final decision, Sylvania be afforded notice of the initial determination and an opportunity to appeal this determination to the Commission.

COUNT SEVEN

36. Sylvania realleges and incorporates by reference paragraphs 1 through 24 of Count One of this Complaint.

37. Disclosure by the Defendants of all or any portion of the data submitted to the Commission in confidence by Sylvania, without establishing and publishing rules of procedure and substantive rules of general applicability to govern the disposition of disclosure requests made pursuant to the Freedom of Information Act is in violation of 5 U.S.C. § 552(a) (1), (C), (D) and (E).

COUNT EIGHT

38. Sylvania realleges and incorporates by reference paragraphs 1 through 24 of Count One of this Complaint.

39. Disclosure by the Defendants of all or any portion

of the data submitted to the Commission in confidence by Sylvania in response to the Commission's subpoena *duces tecum* of July 26, 1974, would be an arbitrary and capricious exercise of their authority and an abuse of agency discretion, and a violation of the express provisions of the Consumer Product Safety Act, 15 U.S.C. § 2055(b), in that: no formal request for disclosure of this information has been lodged with the Commission; the Commission has failed to provide Sylvania with the necessary 30 days notice of its intention to make disclosure; the Commission has failed to provide Sylvania with an adequate summary of the information to be disclosed; and the Commission has failed to provide Sylvania with a reasonable opportunity to submit comments with respect to such disclosure.

PRAYER FOR RELIEF

40. Disclosure by Defendants to the public of all or any portion of the data previously submitted to the Commission in confidence by Sylvania and other manufacturers, or the "computer extraction" or any other similar statistical compilation based upon such data, would cause Sylvania immediate and irreparable injury for which there is no adequate remedy at law. Once released to the public, such data can never be recalled. Disclosure in the present concededly misleading form will adversely effect Plaintiff's competitive position and will subject Sylvania to unwarranted adverse publicity and litigation that may arise from improper inferences and conclusions which may be drawn from data to be disclosed. Moreover, such disclosure would make available to Sylvania's competitors sensitive trade secrets, confidential statistical data and confidential commercial information relating to Sylvania's processes, operations and style of work. Such disclosure will also injure Sylvania's goodwill and reputation with customers and consumers as a result of improper and inaccurate deductions which may be drawn from such misleading information, all to its substantial and irreparable injury.

WHEREFORE, the Plaintiff prays that this Court:

(1) Enter a judgment and decree pursuant to 28 U.S.C. §§ 2201-2202 declaring that disclosure of all or any part of the data provided to the Commission in confidence by Sylvania would be:

(a) in violation of 15 U.S.C. § 2055(b)(1) in that: information contained in the materials to be disclosed is inaccurate and misleading; and disclosure would not be fair in the circumstances or reasonably related to effectuating the purposes of the Consumer Product Safety Act;

(b) an arbitrary and capricious exercise of Defendants' authority and an unlawful abuse of agency discretion, in that the Commission has determined that disclosure of the data as presently contemplated would be misleading;

(c) an arbitrary and capricious exercise of Defendants' authority and an unlawful abuse of agency discretion in that such data is exempted from disclosure under the Freedom of Information Act, 5 U.S.C. § 552(b)(4) and (7);

(d) an arbitrary and capricious exercise of Defendants' authority and an unlawful abuse of agency discretion because such data was submitted pursuant to express and implied assurances of confidentiality to Sylvania by Defendants, and such disclosure is not required by the Freedom of Information Act, 5 U.S.C. 552(b)(4) and (7);

(e) in violation of 18 U.S.C. § 1905;

(f) an arbitrary and capricious exercise of Defendants' authority and an abuse of agency discretion in that Defendants have not afforded Sylvania an opportunity to appeal the disclosure determination of the Staff to the Commission in connection with Sylvania's submission of its data;

(g) in violation of 5 U.S.C. § 552(a)(1)(C-E);

(2) Enter a judgment and decree pursuant to 28 U.S.C. §§ 2201-2202 declaring that disclosure by Defendants of all or any portion of the data submitted to the Commission in confidence by Sylvania in response to the Commission's subpoena *duces tecum* of July 26, 1974, would be an arbitrary and capricious exercise of their authority, an abuse of agency discretion, and a violation of the express provisions of the Consumer Product Safety Act, 15 U.S.C. § 2055(b), in that: no formal request for disclosure of this information has been lodged with the Commission; the Commission has failed to provide Sylvania with the necessary 30 days notice of its intention to make disclosure; the Commission has failed to provide Sylvania with a reasonable opportunity to submit comments with respect to such disclosure.

(3) Enter a preliminary and permanent injunction pursuant to Rule 65, Federal Rules of Civil Procedure, restraining and enjoining Defendants, and each of them, and their successors in office, agents and employees of all other persons acting in concert or participation with them, from disclosing: (1) any and all documents and data provided to the Commission by Sylvania in response to the Commission's Special Order issued May 13, 1974, or in response to the Commission's subpoena *duces tecum* issued July 26, 1974; and (2) any "computer extraction" or other reports, compilations or summaries based upon such data from which Sylvania and/or any other manu-

facturer of television sets and/or components could be identified.

Respectfully submitted,

/s/ James M. Tunnell, Jr.
JAMES M. TUNNELL

/s/ William H. Sudell, Jr.
WILLIAM H. SUDELL

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EXHIBIT "A"

CONSUMER PRODUCT SAFETY COMMISSION
Washington, D.C. 20207

May 13, 1974

Dear Sir:

During the recent public hearing on television safety, the Electronics Industry Association presented aggregate statistics on plans to improve television safety. Although the presentation was informative, it was not responsive to the specific information which manufacturers were asked to present in advance of the hearing. The effort made by your company to supply TV safety data is most appreciated. However, all of the data requested were not submitted, and we would ask that you supply the required information even though part of it may duplicate your earlier submittal.

Therefore, pursuant to section 27(b)(1) of the Consumer Product Safety Act, the attached Special Order of the Commission sets out the information required and requests that it be submitted within two weeks of receipt of the Order.

We recognize that some of the information to be submitted may be proprietary. In this connection, section 6(a)(1) of the Act states,

> "Nothing contained in this Act shall be deemed to require the release of any information described by subsection (b) of section 552, title 5 United States Code, or which is otherwise protected by law from disclosure to the public."

The section of the United States Code referred to contains the Freedom of Information Act as 5 U.S.C. 552 and exempts from disclosure by a federal agency.

> "(b) matters that are—
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential; . . .

> (7) investigatory files compiled for law enforcement proposed except to the extent available by law to a party other than an agency."

In addition, section 6(a)(2) of the Act requires that the Commission keep confidential all information that it receives which relates to trade secrets or other matters referred to at 18 U.S.C. 1905.

You should indicate those submissions that you believe are entitled to exemption from disclosure under the provisions of the Freedom of Information Act. Information for which exempt status is claimed should be specifically identified and reasons given to substantiate the claim for exemption. This information will be received in confidence. It will not be placed in a public file and will not initially be made available to the public. If the Commission receives a request for production or disclosure of the information, a determination to release it would be based on the most recent judicial interpretation at the time the request is received and the applicable provisions of the Consumer Product Safety Act, the Freedom of Information Act, and 18 U.S.C. 1905. If such a request is received, you will be informed and given the opportunity to present additional information and views regarding the exempt status of the materials.

Thank you for your cooperation.

Sincerely,

/s/ Richard O. Simpson
RICHARD O. SIMPSON
Chairman

Enclosure

CONSUMER PRODUCT SAFETY COMMISSION
SPECIAL ORDER

(hereinafter referred to as the Company)

having been requested by the Consumer Product Safety Commission (hereinafter referred to as the Commission) to submit certain information in advance of a public hearing of the Commission held on April 23 and 24, 1974 to discuss shock and fire hazards associated with television receivers,

and

The Company, having elected not to respond to the Commission's request for such information, but instead adopting the industry-wide position of its trade association, the Electronic Industry Association (hereinafter referred to as EIA),

and

The Commission having concluded that the information submitted to the Commission by the EIA on behalf of the Company does not satisfy the Commission's request,

THE CONSUMER PRODUCT SAFETY COMMISSION HEREBY ORDERS THAT, with respect to—

(1) *TV-related accident data.* You are requested to submit all accident reports collected since the 1969 hearings held by the National Commission on Product Safety. If present data recording procedures differ from the method proposed in the 1969 "Electronics Industry Ad Hoc Engineering Report on Television Fires" which was submitted to the National Commission on Product Safety, please indicate the procedures used.

(2) *Current, future-planned, and suggested TV-related safety standards.* Data are requested on (a) standards currently used in industy; (b) those planned for the near future, including effective dates; and (c) those suggested for future use. In particular, you are requested to indicate the implementation status of each safety standard improvement recommendation set forth in the

1969 "Electronics Industry Association Ad Hoc Engineering Report on Television Fires".

(3) *Quality control and quality assurance plans.* Data are requested on present, future-planned, and suggested techniques for controlling and assuring safety-related TV quality. Specific data in this area would be appreciated since we understand that the UL standard to which the industry subscribes does not include quality assurance guidelines.

(4) *Service techniques.* Data are requested on present and future-planned qualification requirements for TV service technicians.

(5) *Improvement plans for presently used TV sets.* Data related to reducing the incidence of fire and shock for existing TV sets are requested.

(6) *Specific technical areas.* Information on accident data, standards, etc. pertaining to the following specific manufacturing trends and design techniques are requested: (a) techniques for protection against overheating; (b) trends toward direct AC to DC chassis design; (c) trends toward use of compact portable TV sets and TV sets with thermoplastic enclosures; and (d) design and manufacturing techniques for minimizing dielectric stress on chassis components.

With respect to information not previously requested: Information is also requested as to standards adopted by the Company which exceeded Underwriters' Laboratories (UL) Standards, and also on tests used to assure compliance with such higher standards.

The Commission orders further that the information requested herein be submitted within two weeks of receipt of this Order.

/s/ Richard O. Simpson
RICHARD O. SIMPSON

EXHIBIT "B"

RUTH L. PROKOP
ATTORNEY AT LAW
Suite 900
1120 Connecticut Avenue
Washington, D.C. 20036
(202) 293-2300

May 28, 1974

Ms. Sayde Dunn
Secretary
Consumer Product Safety Commission
Washington, D.C. 20207

Re: *TV Safety Inquiry*

Dear Ms. Dunn:

On behalf of my client, GTE Sylvania, Incorporated, I am submitting the enclosed letter and certain Attachments pursuant to your request for additional information from individual manufacturers.

We respectfully call to your attention the proprietary nature of the Attachments entitled Product Safety Policy and Procedures (Attachment *B*), Engineering Checklist (Attachment *C*) and Product Safety Manual (Attachment *D*). Accordingly, we request that these documents be afforded confidential treatment in accordance with the provisions of 5 U.S.C. § 552(b)(4) and Section 6(a) of the Act.

Any questions with respect to this matter should be directed to Mr. Richard L. Sanderson at 700 Ellicott Street, Batavia, New York 14020, (716 343-3470) or to the undersigned at the above address.

Sincerely yours,

/s/ Ruth L. Prokop
RUTH L. PROKOP
Attorney for
GTE SYLVANIA, INCORPORATED

RLP:fms
Attachments

EXHIBIT "C"

CONSUMER PRODUCT SAFETY COMMISSION
Washington, D.C. 20207

July 26, 1974

Mr. Merle W. Kremer
President, Entertainment
Product's Group
GTE Sylvania Inc.
Entertainment Products Group
700 Ellicott Street
Batavia, New York 14020

Dear Mr. Kremer:

The Commission has reviewed your response to its May 13, 1974, Special Order requesting information on TV-related fire and shock hazards. Although we recognize your effort to comply with the terms of the Special Order, technical analysis shows that your response fails to provide sufficient information with respect to certain questions enumerated in the Order.

Accordingly, the Commission has decided to issue the attached subpoena, pursuant to section 27(b)(3) of the Consumer Product Safety Act, which specifies the additional information required.

It should be noted that failure to respond to the subpoena within the time specified therein may, pursuant to section 27(c) of the Act, lead to entry of a court order against you directing compliance with the Commission's subpoena.

Other parts of the Consumer Product Safety Act provide for additional sanctions. Section 19(a)(3) prohibits any person from failing or refusing to make reports or provide information required under the Act. Section 20 of the Act provides for the imposition of civil penalties computed on a daily basis, and section 22 provides for injunctive sanctions against any person who knowingly violates section 19 of the Act. Section 21 of the Act, moreover, provides for criminal penalties of fine and imprisonment under certain circumstances.

We would suggest that your response be sent to the Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207 by registered mail, return receipt requested.

Sincerely,

/s/ Sadye E. Dunn
SADYE E. DUNN
Secretary

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION
Washington, D.C. 20207

Subpoena Duces Tecum

Mr. Merle W. Kremer
President, Entertainment
Products Group
GTE Sylvania Inc.
700 Ellicott Street
Batavia, New York 14020

To assist the Consumer Product Safety Commission in its investigation of shock and fire hazards associated with television receivers, you are hereby directed, as authorized by section 27(b)(3) of the Consumer Product Safety Act (15 U.S.C. 2076(b)(3)) to submit duplicate copies of the materials specified below which were not previously submitted in response to the Special Order of the Consumer Product Safety Commission, dated May 13, 1974, to the Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207, within 14 days of receipt of the subpoena:

All TV-related accident reports collected since the 1969 hearings held by the National Commission on Product Safety. The term "reports", includes, but is not limited to, "all physical forms of: correspondence, letters; telegrams; cables; tapes *; recordings; photographs; films; memoranda, including writeups of telephone calls and other oral communications; press releases; bulletins; newspaper, magazine or other journalistic articles; diaries; charts; contracts; agreements; and any other writing prepared by any person or persons, including those by insurance firms, investigators, laboratories and researchers; and includes both originals and copies whether or not sent or received." The term "reports" includes those reports maintained on a form (sample attached) designed by members of the Electronics Industries Association (EIA) and submitted to the National Commission on Product Safety in November 1969 and also those reports

maintained on any and all forms substituted for the attached sample EIA form. (* See requirements for tape specifications attached.)

Records of standards adopted by the Company which exceed Underwriters Laboratories Standards, showing dates of adoption; texts; and specifications; including, but not limited to, diagrams, charts, drawings, and schematics. Records showing methods and instructions used to meet and maintain standards in excess of UL Standards, such as, texts of tests and inspections, and passing criteria, including all quantitative and qualitative tolerance ranges. The term "records" includes, but is not limited to, all manuals, brochures, pamphlets, bulletins, notes, memoranda, orders, and directives, including writeups of telephone calls and other oral communications.

Texts and specifications for suggested TV-related safety standards for future use. Records showing all intra-company discussions, suggestions and proposals concerning improved safety standards, whether or not finally approved by management. The term "records" includes, but is not limited to correspondence, letters, cards, notes, and memoranda, including writeups of telephone calls and other oral communications. (If your company does not have such data, please so state).

Texts and specifications for suggested safety-related quality control and quality assurance plans for future use, including, but not limited to, diagrams, charts, drawings, and schematics. Records showing all intra-company discussions, suggestions and proposals concerning techniques for improving future safety-related quality control programs and also safety-related quality assurance plans for implementing and monitoring such future quality control programs. The term "records" includes, but is not limited to, all manuals, bulletins, statements, notes, cards, and memoranda including writeups of telephone calls and other oral communications. (If your company does not have any or all of this data, please so state).

Records showing design techniques adopted to protect components, and assemblies against overheating, showing dates of adoption, texts and specifications, including diagrams charts, drawings and schematics. The term "records" includes, but is not limited to, all manuals, brochures, pamphlets, bulletins, notes, memoranda, orders, and directives, including writeups of telephone calls and other oral communications.

Records showing design and manufacturing techniques adopted to minimize dielectric stress on chassis components, including descriptions of materials utilized and safety margins provided. The term "records" includes, but is not limited to, all manuals, brochures, pamphlets, bulletins, notes, memoranda, orders, and directives, including writeups of telephone calls and other communications.

BY ORDER OF THE COMMISSION:

In testimony whereof, the undersigned Secretary of the Consumer Product Safety Commission, has hereunto set her hand and caused the seal of said Consumer Product Safety Commission to be affixed at Washington, D.C. this 26th day of July 1974.

/s/ Sadye E. Dunn
SADYE E. DUNN
Secretary
Consumer Product Safety Commission

(File separate report for each incident)

Name of Manufacturer ————————————

Name of Private Label (if any) ————————————

Check Product Covered

Color TV ———— B&W TV ————

Year of Manufacture of Set ————————————

Model Number ————————

Serial Number ————————

Date of Alleged Incident ————————————

Nature of Alleged Incident (check each one applicable)

1. Personal Injury claimed ————
2. Set damaged beyond repair ————
3. Minor repairable damage to set ————
4. Other property damage claimed ————
5. Fire in set only ————
6. Fire other than set only ————
7. No damage to set ————
8. Smoke only ————

Apparent Cause of Incident ————————————

Information for this form furnished by:

1. Set owner ————
2. Dealer ————
3. Distributor ————
4. Manufacturer or private label ————

5. Independent service technician ————
6. Manufacturer affiliated repair technician ————
7. Other ————

1. The purported information in this form is based upon such reports as are available but in many cases will be incomplete, unverified and even incorrect. Such purported information is in no way to be used, directly or indirectly, even as prima facie evidence for any purpose of the alleged facts shown.

2. The manufacturer completing this form will retain it in a central location in its own files for a five year period to be available (a) only on demand by authorized government agencies and (b) subject to such conditions as agreed on in connection with meeting such demand.

ATTACHMENT

Specification for submission of data to the Consumer Product Safety Commission in magnetic tape or punch card file format.

TAPE FILE SPECIFICATIONS

O unlabeled

O 800 BPI density

O odd parity

O 9 track

O IBM 2400 series tape drive compatible

TAPE RECORD SPECIFICATIONS

O unblocked

O EBCDIC code

O description of record formats

O description of symbolic coding schemes employed; e.g., 1=male, 2=female, and 97=Maryland, etc.

PUNCH CARD FILE SPECIFICATIONS

O 80 column punch cards

PUNCH CARD RECORD SPECIFICATIONS

O Hollerith code

O description of record formats

O description of symbolic coding schemes employed

EXHIBIT D

RUTH L. PROKOP
ATTORNEY AT LAW
Suite 900
1120 Connecticut Avenue
Washington, D.C. 20036
(202) 293-2500

August 23, 1974

Ms. Sadye Dunn
Secretary
Consumer Product Safety Commission
1750 K Street, N.W.
Washington, D.C. 20207

Re: *TV Safety Inquiry*

Dear Ms. Dunn:

On behalf of my client, GTE Sylvania Incorporated (Sylvania), I am submitting the response to the Subpoena Decus Tecum issued by the Consumer Product Safety Commission (CPSC) on July 26, 1974 in connection with the above referenced investigation.

We respectfully call to your attention the proprietary nature of Items A-F submitted herewith including, but not limited to, information on accident reports and alleged incident data litigation files, various design techniques, etc. These documents contain sensitive commercial information which, if released, would be competitively damaging to Sylvania. Additionally, Sylvania is submitting these documents in response to the said Subpoena to be included in and treated as part of the CPSC's investigatory files in its television receiver fire and shock hazards investigation. Accordingly, we request that these documents be afforded confidential treatment in accordance with the provisions of 5 U.S.C. Sections 552(b)(4) and (b)(7).

I further direct your attention to the proposed rules recently issued by CPSC entitled "Procedures For Dis-

closure Or Production Of Information Under The Freedom Of Information Act" and specifically to Subpart C, "Disclosure Of Commission Accident Or Investigation Reports Under 15 U.S.C. 2074(c)", 39 FED. REG. 30298-30300, August 21, 1974. Section 1015.20 provides that no portion of Commission accident or investigation reports prepared by Commission employees will be subject to the exemptions contained in the Freedom of Information Act (Act). We understand that this *proposed* exemption from the Act refers only to reports prepared by Commission employees and not to reports submitted by individuals. Nonetheless, since we are today submitting sensitive commercial information including accident reports and alleged incident data, it should be noted for the record that such a proposed rule does not effect Sylvania's right to confidentiality under the Act. Any use of such information by Commission employees must be limited in accordance with prevailing standards of law (see, *Fisher* v. *Renegotiation Board*, 473 F.2d 109, (D.C. Cir., 1972)).

Any questions with respect to this matter should be directed to the attention of the undersigned at the above address.

Respectfully submitted,

/s/ Ruth L. Prokop
RUTH L. PROKOP
Attorney for
GTE Sylvania Incorporated

RLP:fms

Of Counsel:

Edward J. Goldstein
GTE Sylvania Entertainment Products Group
700 Ellicott Street
Batavia, New York 14020

EXHIBIT E

CONSUMER PRODUCT SAFETY COMMISSION
Washington, D.C. 20207

Aug. 2, 1974

Mr. Merle W. Kremer, President
GTE Sylvania, Inc.
Entertainment Products Group
700 Ellicott Street
Batavia, New York 14020

Dear Mr. Kremer:

In accordance with our letter to you of May 13, 1974, this will notify you that we have received requests for disclosure of the information required by the Commission's Special Order of the same date. The requests were made by Consumers Union and the Health Research Group. You will note from the enclosed copies of our July 23, 1974, responses to these organizations that they have been made aware of the procedures for handling data that may be claimed to be confidential by the manufacturer.

The Commission recognizes its obligation under the Freedom of Information Act, 5 U.S.C. 552, to disclose all information which is not exempted from disclosure. Accordingly, if you claimed or intend to claim confidentiality for any data submitted to us voluntarily, in response to the Special Order, and/or in response to the Commission's subpoena issued July 26, 1974, you should submit information or additional information as you consider necessary to substantiate your claim. In particular, you should indicate whether the data is commercial data, and whether the release of this information would cause your company substantial harm in respect to your company's competitive position. The information to substantiate your claim should be submitted to the Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207, not later than Friday, August 30, 1974.

You are advised, however, that a claim of confidentiality is not controlling upon the Commission. Rather, as explained in our letter of May 13, 1974, the Commission must independently determine whether the data claimed to be confidential commercial information is entitled to be treated as such under the Freedom of Information Act, and the appropriate case law. When our review is complete and prior to any disclosure of material claimed to be confidential, we will inform you which materials we consider to be disclosable notwithstanding your claim. At that time you will have an opportunity to determine whether or not you desire to appeal from this initial determination.

Sincerely,

/s/ Donald W. Johnson for
Sadye E. Dunn
Secretary

Enclosures (2)

CONSUMER PRODUCT SAFETY COMMISSION
Washington, D.C. 20207

July 23, 1974

David Charles Masselli, Esquire
Health Research Group
2000 P Street, N.W.
Washington, D.C. 20036

Dear Mr. Masselli:

This is in response to your letter of June 14, 1974 requesting that the Commission disclose the information submitted by television manufacturers in response to the May 13, 1974 Order of the Commission.

The Commission recognizes its obligation under the Freedom of Information Act, 5 U.S.C. 552, to disclose all records that are not exempt from disclosure. Therefore, as you know, the Office of the Secretary now has available for inspection and copying by the public all the information received from TV manufacturers for which no claims of confidentiality have been asserted. The Freedom of Information Act also provides that trade secrets and certain commercial or financial information may be exempt from public disclosure. Accordingly, certain categories of information submitted by the TV manufacturers were accompanied by assertions of confidentiality.

We enclose copies of the Commission Order of May 13, 1974 which lists the categories of information requested by the Commission as well as a covering letter which describes the procedure for handling information claimed to be confidential. The letter states that such materials would not initially be made available to the public and that the TV manufacturers would be informed if requests for disclosure are received. Therefore, the TV manufacturers who claim confidentiality will be informed of your request for disclosure in order to substantiate their claims for confidentiality.

The Commission intends to respond to your request for the TV data as expeditiously as technical analysis and

evaluation of the materials for withholding or disclosure will permit. Upon completion of our review, we will make available a description of the information for which confidentiality is claimed, and a list of those portions of the information which were found to be confidential. At that time, those concerned will have an opportunity to determine whether they desire to appeal this initial determination.

Sincerely

/s/ Sadye Dunn
SADYE E. DUNN
Secretary

Enclosures

CONSUMER PRODUCT SAFETY COMMISSION
Washington, D.C. 20207

July 23, 1974

Marsha N. Cohen, Esquire
Consumers Union
1714 Massachusetts Avenue
Washington, D.C. 20036

Dear Ms. Cohen:

This is in response to your letter of June 14, 1974 requesting that the Commission disclose the information submitted by television manufacturers in response to the May 13, 1974 Order of the Commission.

The Commission recognizes its obligation under the Freedom of Information Act, 5 U.S.C. 552, to disclose all records that are not exempt from disclosure. Therefore, as you know, the Office of the Secretary now has available for inspection and copying by the public all the information received from TV manufacturers for which no claims of confidentiality have been asserted. The Freedom of Information Act also provides that trade secrets and certain commercial or financial information may be exempt from public disclosure. Accordingly, certain categories of information submitted by the TV manufacturers were accompanied by assertions of confidentiality.

We enclose copies of the Commission Order of May 13, 1974 which lists the categories of information requested by the Commission as well as a covering letter which describes the procedure for handling information claimed to be confidential. The letter states that such materials would not initially be made available to the public and that the TV manufacturers would be informed if requests for disclosure are received. Therefore, the TV manufacturers who claimed confidentiality will be informed of your request for disclosure in order to substantiate their claims for confidentiality.

The Commission intends to respond to your request for the TV data as expeditiously as technical analysis and

evaluation of the materials for withholding or disclosure will permit. Upon completion of our review, we will make available a description of the information for which confidentiality is claimed, and a list of those portions of the information which were found to be confidential. At that time, those concerned will have an opportunity to determine whether they desire to appeal this initial determination.

Sincerely,

/s/ Sadye Dunn
SADYE E. DUNN
Secretary

Enclosure

EXHIBIT "F"

GTE SYLVANIA

[ILLEGIBLE]
President

August 29, 1974

Ms. Sadye Dunn, Secretary
Consumer Product Safety Commission
1750 K Street, N.W.
Washington, D.C. 20207

RE: CLAIM OF CONFIDENTIALITY/
GTE SYLVANIA INCORPORATED

Dear Ms. Dunn:

GTE Sylvania Incorporated (GTE Sylvania) hereby respectfully reiterates its claim for confidential treatment with regard to certain information submitted to the Consumer Product Safety Commission (the Commission) pursuant to the Commission's Special Order dated May 13, 1974 and the Commission's Subpoena Duces Tecum issued July 26, 1974. Said claims were contained in two letters filed with the Commission on May 28, 1974 and August 23, 1974, respectively (copies enclosed). Also, pursuant to the Commission's letter to GTE Sylvania, dated August 2, 1974, GTE Sylvania hereby further respectfully requests that confidential treatment be afforded to the Tallies of Accidents Allegedly Caused By Black & White and Color TV Receivers (Attachments *A*) submitted to the Commission pursuant to said Special Order on May 28, 1974 as well as to the information and data, for which confidentiality is otherwise claimed, contained in the transmittal letters accompanying GTE Sylvania's submissions made pursuant to said Special Order and Subpoena.

GTE Sylvania submits that the information for which confidential treatment is requested is exempt from disclosure pursuant to § 6(a) of the Consumer Product Safety Act as that Section embodies §§ 552(b)(4) and (7) of Title 5 of the United States Code. GTE Sylvania

further submits that certain of said information is of the type "not authorized by law" to be disclosed pursuant to § 1905 of Title 18 of the United States Code.

I. EXEMPTION 4

Section 553(b)(4) (hereinafter referred to as Exemption 4) makes the mandatory disclosure provisions of the Freedom of Information Act (FOIA) inapplicable to matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential". The Senate Judiciary Committee Report on S.1160 (later enacted as Pub. L. 90-23) stated, in pertinent part, that Exemption 4:

> ". . . is necessary to protect the confidentiality of information which is obtained by the Government . . . but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists and manufacturing processes. It would also include information customarily subject to the . . . lawyer-client privilege(s)." *

The House Committee on Government Operations viewed Exemption 4 broadly in its report on S.1160, which stated in pertinent part:

> "It exempts . . . material if it would not customarily be made public by the person from whom it was obtained by the Government. The exemption would include business sales, statistics, inventories, customer lists, scientific or manufacturing processes or developments . . . . It would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government." **

With respect to the specific types of information covered by Exemption 4, the Courts have proceeded on a case by

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* *See*, S.Rept. No. 313, 89th Congress, 1st Sess. at 9 (1966).

** *See*, H.R. Rept. No. 1497, 89th Congress, 2d. Sess. at 10 (1966).

case basis. For example, in *Sterling Drug, Inc.* v. *FTC*, the Court held exempt business information such as market shares of certain products, dollar amounts of sales, and certain cost and profit data.* In the recent case of *National Parks and Conservation Association* v. *Morton*, the Court of Appeals for the District of Columbia Circuit recognized that the protection of Exemption 4 is based on more than mere mechanical categorization and reflects a strong public policy against disclosure that would in fact create the possibility of harm to "legitimate private or governmental interests in secrecy".** There the Court said that:

> ". . . commercial or financial matter is 'confidential' for purposes of the exemption of disclosure of the information is likely to have either of the following effects: (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained".***

Thus, bearing in mind the above statements of legislative intent and the D.C. Circuit Court's most recent formulation of the legal standard to be applied in cases involving Exemption 4, the business information for which GTE Sylvania has requested confidential treatment meets both the legislative and judicially fashioned criteria for Exemption 4 treatment:

A. *TV-Related Accident/Incident Data Summaries and Supporting Documents.*

The Summaries of incidents allegedly caused by GTE Sylvania receivers submitted to the Commission pursuant to the Special Order and the summary sheets of alleged fire and smoke reports, together with all supporting docu-

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* *Sterling Drug, Inc.* v. *F.T.C.*, 450 P.2d 698 at 708 (D.C. Cir. 1971).

** No. 73-1033 (D.C. Cir., filed April 24, 1974) at 9.

*** Id at 10.

ments, submitted to the Commission pursuant to the Subpoena are information and documents that are proprietary to GTE Sylvania. The summary sheets specifically set forth data from which GTE Sylvania market share (market penetration) can be derived. This information is extremely confidential to GTE Sylvania and would not customarily be released to the public. This production volume information was released to the Commission only to aid the Commission in making meaningful use of the accident and incident data submitted therewith. Severe competitive harm could well result from public disclosure of GTE Sylvania's color television market share since competitive manufacturers could base marketing decisions on said information. Market share data is the type of information that has traditionally been granted exemption from disclosure.

Just as the report to the Commission of accident/incident data without correlation with production figures would render the data of little significance, the disclosure by the Commission of the raw data could render significant competitive harm by GTE Sylvania in the marketplace because said data alone is susceptible to severe misinterpretation. Also, it is important to note that said data is not released to the public by GTE Sylvania in the ordinary course of its business.

Further, the internal documents and correspondence which support and were the source of the data submitted to the Commission on the summary sheets is confidential to GTE Sylvania and deserve exempt treatment for the same reasons that the summary sheets should be afforded confidentiality.

Also, the consumer correspondence between GTE Sylvania and its customers which support the incident/accident data is treated in the highest confidence by GTE Sylvania; it was given to the Commission in confidence and should be so treated by the Commission. The disclosure of said correspondence would severely injure the reputation of GTE Sylvania. Consumers rightfully expect that correspondence sent and received by them will not be made public.

B. *Trade Secrets, Business Methods and Safety Processes Relating to Product Safety and Reliability*

The below described documents which were submitted to the Commission pursuant to its Special Order and/or Subpoena are proprietary and confidential to GTE Sylvania. These documents represent business methods and practices, safety procedures, patent application disclosures, component specifications and drawings, checklists to help assure that design intent is met, test methods and safety standards internal to GTE Sylvania, and each alone is integral to making GTE Sylvania television receivers safer consumer products. Thus, each is also an integral part of making GTE Sylvania receivers more reliable and competitive in the marketplace. None of these documents is customarily released by GTE Sylvania to the public, and disclosure by the Commission would mean the abrogation of a business method, business practice, trade secret, or safety related procedures or standard of GTE Sylvania. Each of these documents was evolved by Sylvania, many at great expense, and represent an efficient, effective way of meeting safety and reliability goals. Since efficiency and reliability translate quickly into competitive factors in the marketplace, the disclosure of any of these documents could well mean the loss to GTE Sylvania of a competitive advantage, and in the television industry, the loss of any competitive advantage will work substantial harm.

1. *PRODUCT SAFETY POLICY AND PROCEDURES*: This document sets forth GTE Sylvania's business method of meeting its safety requirements and includes specific manpower responsibilities. Also, it sets forth the procedures for implementing safety goals by the design, component procuring and quality assurance departments of GTE Sylvania.

2. *ENGINEERING CHECKLIST/DESIGN CHECKLIST*: These are detailed guidelines used by engineering design personnel to assure that GTE Sylvania engineering prototypes meet GTE Sylvania engineering design intent.

3. *PRODUCT SAFETY MANUAL*: This document sets forth internal requirements for safety of GTE Sylvania products which exceed Underwriter's Laboratories Standards, which requirements make GTE Sylvania products safer and more reliable.

4. *PRODUCT SAFETY TEST PROCEDURES*: This document sets forth step-by-step instructions on how to conduct the various GTE Sylvania safety tests for both UL and internal standards. The document also includes data sheet forms on which test results are recorded.

5. *COMPONENT SPECIFICATIONS*: These documents include drawings and/or specifications of certain components used in the manufacture of GTE Sylvania products. The drawings are given to vendors on a confidential basis to manufacture said components for GTE Sylvania.

6. *DESIGN STANDARDS FOR HANDLE, CART/STAND*: These documents set forth the test method used by GTE Sylvania to assure the integrity of handles as a component of the TV receiver and to assure the strength and stability of carts and stands. Both methods reflect internal procedures over and above UL Standards.

7. *CRITICAL LEAD DRESS INSTRUCTIONS*: These documents assure that in the manufacturing process, certain components are dressed in a way to prevent malfunctions caused by overheating of those components.

8. *PATENT APPLICATION DISCLOSURES*: These documents, which include trade secrets, are the basis of patent applications currently pending and filed with the U.S. Patent Office under docket Nos. D-7499, D-7908, D-7890, D-7110, D-7483, D-7111, and D-7717. The U.S. Patent Office is affording confidential treatment to those applications.

C. *Consumer Correspondence, Correspondence and Documents Relating to Claims Against GTE Sylvania and Litigation Files*

The documents submitted to the Commission pursuant to its Subpoena supporting the Summaries of Accidents Allegedly Caused by Television Receivers were gathered primarily from consumer correspondence, insurance and claim, and litigation files. Many of these documents relate to present or potential litigation, and those documents, except for documents which are of public records, should be considered privileged documents contained in an attorney's work file. Further, documents which are sent to GTE Sylvania by its outside counsel or by or to GTE Sylvania in-house counsel with regard to litigation or potential litigation cases should be afforded confidential treatment under Exemption 4 pursuant to the attorney-client privilege. These documents, treated by GTE Sylvania in the highest confidence, are not released to the public in the ordinary course of GTE Sylvania's business and in addition to the reasons set forth in Paragraph A, above, should be treated as confidential by the Commission pursuant to Exemption 4.

II. *Exemption 7*

Section 552(b)(7) of the FOIA (hereinafter referred to as Exemption 7) makes the disclosure provisions of the Act inapplicable to "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency". The scope of the exemption was broadly construed in the House Report on S.1160, which stated that the exemption "covers investigatory files related to *all kinds of laws*, labor and securities laws as well as criminal laws." * (Emphasis added). In addition, the Circuit Court for the District of Columbia has recently established a test for non-disclosure under Exemption 7. In *Ditlow* v. *Volpe* ** plaintiffs sought disclosure of correspondence between the

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* *See*, H.R. Rept. No. 1497, 89th Cong. 2d. Sess. at 11 (1966).

** 362 F.Supp. 1331 (D.D.C. 1973).

National Highway Traffic Safety Administration and certain automobile manufacturers related to a pending safety defect investigation. The District Court ordered disclosure of the correspondence on the ground that application of Exemption 7 required a showing "that disclosure of the files sought is likely to create a concrete prospect of serious harm to law enforcement efficiency" and that since the date had been submitted by the party under investigation, disclosure thereof would raise none of the problems normally associated with such disclosure, such as revealing the identity of confidential sources and so on. The Circuit Court reversed and held the correspondence connected with the pending safety defect investigation to be within Exemption 7, holding that "if the documents in issue are clearly to be classified as 'investigatory files compiled for law enforcement purposes', the exemption attaches and it is not in the province of the courts to second-guess the Congress by relying upon considerations which argue that the Government will not actually be injured by revelation in the particular case." *

Surely the information submitted to the Commission by GTE Sylvania is being compiled in connection with a pending safety investigation undertaken for law enforcement purposes and, under the rule enunciated by the Circuit Court in *Ditlow*, falls within Exemption 7.

III. *CPSC "Guidelines"*

Finally, the Commission's proposed "Procedures for Disclosure or Production of Information under "Freedom of Information Act" ** and the statutory provision on which they are based provide no legal basis for the disclosure of the information submitted by GTE Sylvania. Section 25(c) of the Consumer Product Safety Act *** provides that ". . . notwithstanding Section 6(a)(1),

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* *See*, Ditlow v. Brinegar, 494 F.2d 1073 at 1074 (D.C. Cir. 1974).

** 39 FED. REG. 30298 (1974).

*** 15 U:S.C. § 2074(c).

. . . accident or investigation *report* made under this Act *by an officer or employee of the Commission* shall be made available to the public . . ." (Emphasis added). Section 6(a)(1) of the Act provides that "Nothing contained in this Act shall be deemed to require the release of any *information* described by Subsection (b) of Section 552, Title 5, United States Code, or which is otherwise protected by law from disclosure to the public.* These two provisions, read together, clearly distinguish between *information* exempt from disclosure under § 552(b) of the FOIA and accident or investigation *reports made by agency officers* clearly subject to mandatory disclosure. This distinction was recently reiterated in *Fischer* v. *Renegotiation Board* ** where the court held that agency reports and opinions derived from the agency's own analysis of otherwise exempt data were themselves subject to mandatory disclosure under § 552(a)(2)(A) of the FOIA.

The Commission's proposed guidelines for disclosure are thus properly interpreted as requiring only the disclosure of accident and investigation reports made by Commission officers, assuming that such reports do not themselves contain the kind of identifiable raw data submitted by GTE Sylvania.

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* 15 U.S.C. § 205(a)(1) (Emphasis supplied).

** 355 F.Supp. 1171 (D.D.C. 1973).

Conclusion

For the foregoing reasons and the others previously advanced GTE Sylvania respectfully submits that the information it has submitted in response to the Commission's Special Order and Subpoena Duces Tecum should be granted confidential treatment under the Freedom of Information Act.

Respectfully submitted,

/s/ Edward J. Goldstein
EDWARD J. GOLDSTEIN
Attorney for
GTE Sylvania Incorporated
Entertainment Products Group

EJG:tr

Of Counsel:

Ruth L. Prokop
General Telephone & Electronics Corporation
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

EXHIBIT "G"

April 8, 1975

Mr. Merle W. Kremer
President, Entertainment Products
Group
GTE Sylvania Inc.
Entertainment Products Group
700 Ellicott Street
Batavia, New York 14020

Dear Mr. Kremer:

This is to formally notify you of the Commission's final decision to release accident and technical data which your company submitted in response to the Commission's special order of May 13, 1974, and/or the Commission's subpoena of July 26, 1974. Some of this information was claimed to be of a confidential nature.

The Commission has decided to release all accident and technical data with the exception of the following categories of information:

(1) accident data in the form of legal correspondence which by its nature is privileged because it is within the attorney-client relationship or the attorney work product doctrine;

(2) accident data which contain the names and addresses of accident victims or other information, the release of which might result in a invasion of an individual's personal privacy;

(3) technical data which have been kept confidential by the company and which might cause substantial harm to the company if released;

Accidental data other than that within the first two exceptions were found to be disclosable because the data did not qualify as "commercial information" under the exemption provisions of section 552(b)(4) of the Freedom of Information Act (5 U.S.C. 552). Furthermore,

even if the accident data could be considered confidential "commercial information" within the exemption provisions of section 552(b)(4), the Commission decided that the data should be released in the interest of the public health and safety.

With regard to release of the submitted technical data, you are advised that engineering studies and other reports which discuss manufacturing techniques and which have been prepared at company expense would generally be considered exempt from disclosure within the scope of the third aforementioned exception.

A more complete discussion of the Commission's reasons for disclosing these data is contained in the enclosed memorandum which formed the basis for the Commission's decision. As stated in this memorandum the Commission will accompany release of the accident data with a statement that the information could be misleading because some television manufacturers maintained more complete accident records than other manufacturers.

As provided by section 1015.17(c) of the Commission's Interim Freedom of Information Guidelines (16 CFR, Part 1015), the accident and technical data will not be released for at least 10 days after your receipt of this letter.

Sincerely,

VINCE DELUISE
Director,
Freedom of Information Officer

cc: OS Reading File
OS FOI

VDeLuse:vln:4/8/75

UNITED STATES GOVERNMENT

MEMORANDUM

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

TO : The Commissioners DATE: March 21, 1975

FROM : Edward J. Cull

SUBJECT: Freedom of Information Act Requests for Disclosure of Information claimed to be confidential and submitted by television manufacturers in response to our special order of May 13, 1974 and our subpoena of July 26, 1974

Thru: Sadye Dunn, Secretary

Thru: Michael Brown, General Counsel

Thru: Richard Allen, Asst. General Counsel for Administration

Background:

On May 13, 1974, a special order (Attachment A) was sent to 25 manufacturers of TV sets or components requiring them to submit data for the following categories of information: (1) all TV-related accident data collected since the 1969 hearings held by the National Commission on Product Safety; (2) current, future planned and suggested TV-related safety standards; (3) quality control and quality assurance plans; (4) data on future planned qualification requirements for TV service technicians; (5) improvement plans for presently used TV sets; (6) data on specific technical areas; and (7) data on standards adopted which exceed Underwriters' Laboratories' (UL) Standards. In response to the special order, approximately two cubic feet of information was submitted. The accident data consisted primarily of company forms describing the accidents in general terms without any backup information.

With the exception of a few manufacturers who were no longer producing TV sets, most of the manufacturers claimed that their accident data was confidential and in

some cases that their technical data (submitted in response to categories 2-7 above) were confidential.

On June 14, 1974, Health Research Group and Consumers Union made formal requests (Attachments B and C, respectively) under the Freedom Of Information Act, 5 U.S.C. 552, for the disclosure of all information submitted pursuant to the special order. All information not claimed to be confidential was subsequently disclosed.

The analysis of the submitted data by the Bureau of Engineering Sciences disclosed that additional data were not required from the manufacturers of TV components but that more information was needed from the manufacturers of TV sets. As a result, on July 26, 1974, a *subpoena duces tecum* was served on 16 television manufacturers. The subpoena (Attachment D) called for the submission of the following types of information:

(1) All TV-related accident reports since the 1969 hearings [corresponds to category one of the special order]; (2) records of standards adopted which exceed UL standards [corresponds to category seven of the special order]; (3) Texts and specifications for suggested TV-related safety standards for future use [corresponds to category two of the special order]; and (4) texts and specifications for suggested safety-related quality control and quality assurance plans for future use [corresponds to category three of the special order]. In addition, three manufacturers were required to submit information on (5) AC to DC chassis design development, (6) overheating design techniques, and (7) di-electric stress design techniques.

In response to the subpoena, approximately 48 cubic feet of material was submitted. This represents approximately 120,000 pieces of paper. It is estimated that approximately 50,000 pages are unmarked duplicates which when identified and sorted out would reduce the page total to 70,000. Of these 70,000 pages, roughly 80% or 55,000 pages consist of accident data. The remainder, 20% or 15,000 pages, consist primarily of technical information.

With the exception of Sanyo which submitted very little information, the remaining 15 TV manufacturers made claims of confidentiality for the data submitted in response to the subpoena. Thirteen manufacturers claimed confidentiality for all the information they submitted. Two manufacturers claimed confidentiality only for the accident data they submitted. The small amount of data not claimed to be confidential was made available to the requesters, Health Research Group and Consumers Union, whose earlier requests were deemed to extend to the subpoenaed materials.

On February 7, 1975, the Commission awarded a contract to Tracor-Jitco to process the accident data. By the terms of the contract, (Attachment E), Tracor-Jitco agreed, among other things, to extract certain information from the accident data. The extracted data would then be punched on computer cards and analyzed by us for accident patterns and for the use of the offeror chosen to develop a TV standard. The extracted accident data will consist of the following categories of information: (1) File number assigned to the accident, (2) manufacturer, (3) model numbers, (4) chassis number, (5) TV type (color or black and white), (6) chassis type, (7) switch type, (8) model type, (9) cabinet material, (10) year of manufacture, (11) owner's initials, (12) failed part, (13) location of failed part in set, (14) prior indication of trouble, (15) repaired prior to accident, (16) electric power status, (17) time in electric power status, (18) type of accident, (19) time of day, (20) state, (21) location, (22) number of injuries, (23) number of fatalities, (24) damage and (25) amount and type of claims. A copy of the extraction form is appended as Attachment F. The extraction of data is expected to be completed by the end of March.

Brief Description of the Material Subpoened:

The most important part of the material subpoened in terms of its importance to the manufacturers and requesters is the accident data. It is estimated that the data contain approximately 7,000 accident reports. The

type of information in the accident reports can be roughly broken down into the following categories of information:

1. Legal correspondence—correspondence, memos, etc., between a manufacturer and his attorney, whether within or outside the company relating to the settlement of claims or the handling of lawsuits.
2. Claim Settlements—data on how claim settlements were arrived at and how to proceed with claims that have not been settled.
3. Opinions—information from the manufacturers' own investigators and others, such as fire departments, on the causes of TV-related accidents.
4. Inter-Office Memoranda—memos and other correspondence among a manufacturers' personnel discussing various accidents.
5. Identity of the Victims and the Circumstances surrounding an accident—names and addresses of the people involved in TV-related accidents; model number of TV; information about how the accident occurred; who, if anyone, was injured or killed; the physical damage incurred, etc. There may also be taped conversations with an accident victim and photographs of the victim's dwellings depicting the damage caused by a TV-related accident.
6. Miscellaneous—a collection of data that is not relevant to TV hazards or safety.

The remainder of the information subpoened can be classified into two categories: (1) standards data which would include information with respect to standards that exceed UL standards, future TV-related safety standards and safety-related quality control and quality assurance plans; (2) design data which would include the information obtained from three manufacturers regarding AC to DC chassis design development, overheating design techniques and di-electric stress design techniques.

Some of the categories used to describe the accident data are also applicable to the standards and design data. Opinions and inter-office memoranda are also found in the standards and design data. These opinions or memoranda discuss among other things: manufacturing techniques, processes and materials; funding for engineering studies; and improvements in the safety of a TV model. In addition, there are engineering studies and other reports which were prepared by company personnel or by outside organizations funded by the manufacturer. Some of these reports have been kept confidential; others have been made public. The remainder of the standards and design data consists of blueprints, plans, manuals, etc.

Discussion:

Because of the novelty and importance of the legal issues raised in the Freedom of Information (FOI) request for the TV data, it was deemed advisable to refer this matter directly to you rather than have the Secretary make an initial decision. The other principal reason for referring this matter to you is that our interim FOI guidelines (39 Fed. Reg. 30298) do not provide for an appeal to the Commissioners by the person claiming confidentiality for his data if his claim should be denied by the Secretary. Even if we allowed the TV manufacturers to appeal an adverse decision by the Secretary, the manufacturers would be under no legal obligation to do so and could immediately file suit in a Federal District Court. Given the possibility that a decision by the Secretary might be appealed directly to a court of law, it was deemed advisable to refer this matter to you so that you would have the opportunity to make a final decision on behalf of the Commission.

Almost all of the manufacturers who claimed confidentiality relied upon 5 U.S.C. 552(b)(4) which exempts trade secrets and confidential commercial or financial information. (A copy of the manufacturers' claims for confidentiality are available in the Secretary's office). In order for information to qualify under the 'trade secret' exemption, it must be either a trade secret or it must meet the following three criteria: (1) be commercial or financial information, (2) obtained from a person (rather than from another government agency), and (3) be privileged or confidential. (*National Parks and Conservation Association* v. *Morton*, 498 F.2d 765, 766 (1974).

The accident data submitted by the TV manufacturers definitely meets the second criteria, i. e., obtained from a person. It also appears to meet the third criteria, i.e., confidential. In order to substantiate a claim of confidentiality, it is necessary to show that the release of the information is likely ". . . to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks and Conservation Association* v. *Morton supra*, at 770. The TV manufacturers asserted that the release of their accident data would drastically affect their sales and would tarnish their corporate images. It does not appear, however, that the data meet the first criterion of "commercial" information.

The House Report on the Freedom of Information Act (H. Rept. No. 1497), 89th Cong., 2d Sess.) lists various types of information which are considered confidential commercial or financial information. The House Report states:

> The exemption [5 U.S.C. 552(b)(4)] would include business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments, and negotiation positions or requirements in the case of labor-management mediations. It would include information customarily subject to the doctor-patient, lawyer-client, or lender-borrower privileges such as technical or financial data submitted by an applicant to a Government lending or loan guarantee agency.
>
> (H.Rept. No. 1497 at p. 10)

Almost identical language is found in the Senate Report on the Freedom of Information Act (S. Rept. No. 813, 89th Cong. 1st Sess. at p. 9).

Although the types of information listed in the House Report should not be considered exclusive, it does not appear that accident data is the type of information that Congress intended to include by the term "commercial information." The only cases which have discussed what types of information can be considered "commercial" are

Petkas v. *Staats*, 364 F. Supp. 680 (D.D.C.) 1973) rev'd on other grounds 501 F. 2d 889 (1974) and *Washington Research Project Inc.* v. *Department of H.E.W.*, 336 F. Supp. 929 (D.D.C. 1973). Neither case is of assistance with respect to accident data.

In the absence of any court cases and in view of the legislative history, it does not appear that accident data qualifies as commercial information and, thus, should be disclosed.

Assuming *arguendo* that accident data did constitute commercial information, (1970), the accident data could, nevertheless, be released because of the overriding public health and safety issue involved. Section 2(b)(2) of the Consumer Product Safety Act, Pub. Law 92-573, states that one of the purposes of this Act is: "to assist consumer in evaluating the comparative safety of consumer products." The release of the accident data would assist consumers to better evaluate the safety of TVs. However, as mentioned in the September 10, 1974 briefing package on the release of vinyl chloride information claimed to be confidential, no court has really decided whether to release or withhold confidential commercial information because the public health was involved.

It does not appear that all of the accident data should be released. Two categories of information in the accident data appear entitled to confidential treatment. The first category is the identity of the victim. Arguably, the identity of the victim should be withheld under 5 U.S.C. 552(b)(6) which protects from disclosure . . . "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The accident reports might constitute "similar files" because if an injury is sustained by a victim, there will usually be a discussion of the injuries and the medical treatment rendered in the accident reports. Some of the accident victims might consider the release of this type of information to the public to be an invasion of their personal privacy. See, *Rural Housing Alliance* v. *United States Department of Agriculture*, 498 F. 2d 73 (D.C. Cir. 1974) for a more complete discussion of when 5 U.S.C. 552(b)(6) is applicable.

The second reason for withholding the identity of the victim is to achieve consistent treatment between accident reports submitted to the Commission and accident reports obtained from manufacturers. Under Section 25(c) of the Consumer Product Safety Act, the Commission is required to withhold the identity of an accident victim unless his/her consent is obtained. To establish a different standard for accident victims whose identity is obtained from a manufacturer might be considered inequitable treatment.

If the requesters would like to contact some accident victims, the Commission could seek to obtain the permission of the victims to release their names provided this does not prove to be too burdensome on our resources and time.

The second category of information in the accident data apparently entitled to confidential treatment is legal correspondence, memoranda, etc., which fall within the attorney-client privilege and/or the attorney's work product doctrine. The attorney-client privilege is mentioned in the legislative history of the Freedom of Information Act, quoted above, as falling within the trade secret exemption. The attorney work product doctrine is closely akin to the attorney-client privilege and provides a qualified immunity from disclosure of documents prepared by an attorney or his agent in anticipation of litigation. Wright and Miller, *Federal Practice and Procedure* § 2024 (1970). It should be noted that no Freedom of Information cases have arisen where the disclosing or withholding of the attorney's work product was decided. Since the attorney-client privilege is recognized as falling within the 'trade secret' exemption, logically the attorney's work product should also be covered. It is anticipated that there may be some difficulty in applying the attorney work product doctrine because of uncertainty whether the data was prepared in anticipation of litigation or by an agent of the attorney such as an investigator. However, the difficulty which may be encountered in applying an exemption should not work against its application.

The accident data that will be extracted by our contractor and placed on computer punch cards, (refer page

2 of this memorandum) does not contain the identity of the victim or any information subject to the attorney client privilege and/or the attorney work product doctrine.

With respect to the standards and design data, it appears that externally funded engineering studies which have not been made public fit the definition of confidential commercial information. Other types of confidential commercial information in the categories of standards and design data would be the company memos discussing techniques, processes or materials which are not known to other TV manufacturers and are not available from outside sources. The remainder of the standards and design data would be reviewed by a team of engineers to determine whether the release of the data would be likely to cause substantial harm to the competitive position of the manufacturer and whether the data has been kept confidential by the manufacturer.

The data obtained pursuant to the special order would be subject to the same disclosability/non-disclosability standards that the Commission establishes for the subpoenaed data.

Recommendations:

For the reasons discussed above, it is recommended that the Commission release all accident data submitted pursuant to our special order and subpoena with the following exceptions: (1) legal correspondence, memoranda, etc., which are exempt under the attorney-client privilege and/or the attorney work product doctrine; (2) the names and addresses of the accident victims as well as other identifying information.

It is recognized that some television manufacturers have apparently been more conscientious in compiling accident data than others and thus, the release of the accident data might be misleading in some cases, i.e., a higher accident rate for one particular TV model than similar models because more complete records were maintained. To ameliorate this problem, the Commission could release a simple statement at the time the accident data is

disclosed stating that the data could be misleading because some manufacturers maintained more complete accident records than other manufacturers.

It is also recommended that the data extracted by our contractor and placed on computer punch cards be made available to the requestors.

With respect to the standards and design data, it is recommended that the Commission not disclose the following: (1) engineering studies and other reports which have been prepared at company expense and not disclosed to the public; (2) memos and similar documents which discuss manufacturing techniques, processes, and the like that are unknown to other TV manufacturers and not available from outside sources; and (3) the remainder of the standards and design data which meet the tests of (a) causing substantial harm if released and (b) kept confidential by the manufacturers.

c:

C. Casper, SCAT (834)
W. Hobby, BEA (909)
R. Allen, OGC
E. Cull, OGC
S. Dunn, Secretary

[Illegible]

[Illegible] [Illegible]

ROBERT PALMER
Covington & Burling
988 15th St., NW.
Washington, D.C. 20006

The Consumer Product Safety Commission today decided that no documents submitted by your company pursuant to subpoena or special orders or statistical analysis, compilations or other summaries based upon such documents will be released until May 2, 1975.

Signed: Sadye Dunn, Secretary
Consumer Product Safety Commission

15:20 EST

MGMWSHT HSA

[Title Omitted in Printing]

TEMPORARY RESTRAINING ORDER

Upon Plaintiff's Complaint and supporting exhibits and its Verified Application for Temorary Restraining Order together with its supporting affidavits, the Court concludes:

1. Defendants intend to disclose to members of the public certain data previously supplied by Plaintiff to the Defendant Commission and/or documents purporting to reflect summaries or compilations of this data.

2. Plaintiffs contends: that these data were submitted to Defendants under express and implied understandings that such data would remain confidential and not subject to public disclosure; that such disclosure would violate 5 U.S.C. § 552(b)(4) and (7), 15 U.S.C. § 2055 and 18 U.S.C. § 1905; that such disclosure is not required by the Freedom of Information Act, 5 U.S.C. § 522; that such disclosure, by violating express and implied assurances of confidentiality, will constitute an unlawful abuse of agency discretion; that such disclosure will violate Defendants' own rules and regulations; and that it will suffer immediate and irreparable harm if public disclosure of the documents and information is made by Defendants.

3. It appears to this Court that there is a reasonable probability that Plaintiff will succeed on the merits of this case; that Defendants would not be subject to material prejudice by grant of this temporary restraining order pending disposition of Plaintiff's application for a preliminary injunction; and that, unless the Court grants this temporary restraining order, Plaintiff will suffer irreparable harm and injury if public disclosure of the aforesaid documents and information is made by Defendants.

4. Plaintiff has served upon counsel for Defendant all pleadings and papers herein and given notice of its intention to seek a temporary restraining order from this Court. Counsel for Defendants has consented to the entry of a temporary restraining order until such time as this

Court has heard and determined Plaintiff's application for a preliminary injunction.

Accordingly, it is hereby ORDERED, ADJUDGED AND DECREED, this 25th day of April, 1975, that Defendants, their agents, officers and employees, are hereby enjoined from disclosing any of the following until the Court has heard and determined Plaintiff's application for a preliminary injunction or until further Order of the Court:

(1) Any data submitted by Plaintiff to the Defendant Commission in response to a special order issued May 13, 1974;

(2) Any data submitted by Plaintiff to the Commission in response to a subpoena duces tecum issued by the Commission on July 26, 1974; and

(3) Any report, extraction, computer analysis, or other document or documents purporting to be a summary or compilation of the data previously supplied to the Commission described in paragraphs 2 and 3 above.

/s/ James L. Latchum
JAMES L. LATCHUM
United States District Judge

[Title Omitted in Printing]

ORDER

After consultation with counsel, and by agreement of the parties, it is hereby ordered this 29th day of May, 1975;

1. That the above-referenced cases are consolidated for purposes of discovery and a hearing on the plaintiffs' motions for preliminary injunctions.

2. That the defendants' answer or answers to the complaints herein shall be served not later than May 28, 1975.

3. That memoranda, briefs and affidavits in support of the motions for preliminary injunctions shall be served by plaintiffs not later than June 11, 1975.

4. That the defendants' responsive memoranda, briefs and affidavits shall be served not later than June 25, 1975.

5. Any further reply memoranda, briefs or affidavits by the plaintiffs shall be served not later than July 9, 1975.

6. Oral argument on the plaintiffs' motions for preliminary injunctions shall be held on July 23, 1975, at 11:00 A.M.

7. The transcripts of any depositions taken herein and the exhibits marked at such deposition shall be filed with the court under seal and kept under seal until further order of the court. Any confidential information contained in such transcripts and exhibits shall not be divulged except to counsel of record in these cases and other lawyers actively engaged in the litigation of these cases on behalf of the plaintiffs or the defendants.

(8) The deposition of defendant Richard O. Simpson, noticed by plaintiff Zenith Corporation, is adjourned *sine die*.

(9) At depositions of any defendant or any agents or employees of a defendant, any of the plaintiffs shall have the privilege of instructing the witness not to answer questions that call for the disclosure of confidential information pertaining to that plaintiff, subject to the further order of this court.

(10) All further memoranda, briefs and affidavits herein shall be filed initially under seal, but shall be automatically unsealed five days after service upon the parties is completed, unless one of the parties demonstrates good cause as to why the sealed material should not be unsealed.

All counsel of record have agreed to the entry of this Order.

/s/ James L. Latchum
JAMES L. LATCHUM
Judge

CONSENTED TO:

/s/ William H. Sudell, Jr.
WILLIAM H. SUDELL, JR.
1105 N. Market St.
Wilm., Del.
Attorney for GTE Sylvania Incorporated and Aeronutronic Ford Corporation

/s/ Andrew G. T. Moore
ANDREW G. T. MOORE
Market Tower
Wilm., Del.
Attorney for RCA Corporation

/s/ Richard J. Abrams
RICHARD J. ABRAMS
4072 DuPont Building
Wilm., Del.
Attorney for Magnavox Company

/s/ Januar D. Bove, Jr.
JANUAR D. BOVE, JR.
Farmers Bank Building
Wilm., Del.
Attorney for Zenith Radio Corporation

/s/ Charles S. Crompton, Jr.
CHARLES S. CROMPTON, JR.
350 Delaware Trust Building
Wilm., Del.
Attorney for Motorola, Inc. and
Teledyne Mid-America Corporation

/s/ Howard M. Berg
HOWARD M. BERG
500 Wilmington Tower
Wilm., Del.
Attorney for Warwick Electronics, Inc.

/s/ H. James Conaway, Jr.
H. JAMES CONAWAY, JR.
1401 Market Tower
Wilm., Del.
Attorney for General Electric
Corporation

/s/ W. Laird Stabler, Jr.
W. LAIRD STABLER, JR.
U. S. Attorney
Federal Bldg., Wilm., Del.
Attorney for Defendants

[Title Omitted in Printing]

ANSWER

First Defense

Plaintiff's complaint fails to state a claim upon which relief can be granted.

Second Defense

The Consumer Product Safety Commission, Sadye Dunn, and Vince DeLuise are not proper parties to this action.

Third Defense

In specific response to each numbered paragraph of plaintiff's complaint, defendants state:

1. Defendants are without knowledge or information sufficient to form a belief as to the truth of this paragraph.
2. Admit.
3. Admit.
4. This paragraph contains a conclusion of law and not averments of fact to which an answer is required, but insofar as an answer may be deemed required, it is denied.
5. Deny except to admit the authenticity of the letter dated April 8, 1975 and the attachment thereto, Exhibit G to plaintiff's complaint, and to refer the court to that exhibit for a full and complete statement of the contents thereof.
6. Deny except to admit the authenticity of Exhibit A to plaintiff's complaint and to refer the court thereto for a full and complete statement of the contents of the letter dated May 13, 1974 and the Special Order.
7. Deny except to admit the authenticity of Exhibit B to plaintiff's complaint and to refer the court thereto for a full and complete statement of the contents thereof.
8. Deny except to admit the authenticity of Exhibit C to plaintiff's complaint and to refer the court thereto for a full and complete statement of the contents thereof.

9. Deny except to admit the authenticity of Exhibit D to plaintiff's complaint and to refer the court thereto, for a full and complete statement of the contents thereof.

10. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in this paragraph.

11. Deny except to admit the authenticity of Exhibit E of plaintiff's complaint and to refer the court thereto for a full and complete statement of the contents thereof.

12. Deny except to admit the authenticity of Exhibit F of plaintiff's complaint and to refer the court thereto for a full and complete statement of the contents thereof.

13. Deny.

14. Deny except to admit the authenticity of Exhibit G to plaintiff's complaint and to refer the court thereto for a full and complete statement of the contents thereof and to specifically refer the court to the Fourth paragraph of page 6 of the attachment, which indicates that at present no technical data, which is there referred to as standards and design data, is being released.

15. Admit.

16. Deny.

17. The first and third sentences of this paragraph are admitted. The second and fourth sentences of this paragraph are denied.

18. The first two sentences of this paragraph are denied except to refer the court to the April 8, 1975 letter for a full and complete statement of the contents thereof. The third and fourth sentences of this paragraph are denied except to refer the court to 39 F.R. 30298 (August 21, 1974) for a full and complete statement of the Interim Guidelines and their effect. The fifth sentence is admitted.

19. Deny except to refer the court to Exhibit G for a full and complete statement of the contents thereof.

20. Admit.

21. Deny except to refer the court to the staff memorandum referred to for a full and complete statement of the contents thereof.

22. Deny except to refer the court to the staff memorandum for a full and complete statement of contents thereof.

23. Deny except to admit the first sentence of this paragraph.

24. Deny except to refer to the Interim Guidelines at 39 F.R. 30298 (August 21, 1974) for a full and complete statement of the contents thereof.

25. Deny.

26. Defendants' answers to paragraphs 1-24 of the complaint are hereby adopted by reference as though they were fully set forth herein.

27. Deny.

28. Defendants' answers to paragraphs 1-24 of the complaint are hereby adopted by reference as though they were fully set forth herein.

29. Deny.

30. Defendants' answers to paragraphs 1-24 of the complaint are hereby adopted by reference as though they were fully set forth herein.

31. Deny.

32. Defendants' answers to paragraphs 1-24 of the complaint are hereby adopted by reference as though they were fully set forth herein.

33. Deny.

34. Defendants' answers to paragraphs 1-24 of the complaint are hereby adopted by reference as though they were fully set forth herein.

35. Deny.

36. Defendants' answers to paragraphs 1-24 of the complaint are hereby adopted by reference as though they were fully set forth herein.

37. Deny.

38. Defendants' answers to paragraphs 1-24 of the complaint are hereby adopted by reference as though they were fully set forth herein.

39. Deny.

40. Deny.

Defendants hereby specifically deny all the allegations of the complaint not hereinbefore otherwise answered.

Defendants deny that plaintiff is entitled to the relief sought by the complaint or to any relief whatsoever.

WHEREFORE, defendants pray that the action be dismissed with prejudice and that defendants be granted their costs.

Respectfully submitted,

REX E. LEE
Assistant Attorney General

W. LAIRD STABLER
United States Attorney

HARLAND F. LEATHERS

JEFFREY AXELRAD

BARRY M. KATZ
Attorneys, Department of Justice
Attorneys for Defendants
Washington, D.C. 20530
Telephone: 202-739-3305

[Title Omitted in Printing]

ORDER

AND NOW, TO WIT, this 11th day of July, 1975, the United States Consumer Product Safety Commission ("the Commission") having moved for a modification of the Temporary Restraining Orders heretofore entered in these cases to permit a certain limited disclosure to Underwriters Laboratories, Inc. ("UL") of materials covered thereby, it is

ORDERED:

1. UL and those assisting UL in development of safety standards for television receivers shall be permitted access to computerized summaries of "accident reports" submitted to the Commission in response to the Commission's July 26, 1974 subpoena duces tecum (served on 16 television manufacturers) in a form that does not, directly or indirectly, identify the manufacturer, model or chassis number of any television receiver alleged to have been involved in any "accident" or the number of "accidents" allegedly associated with any particular manufacturer, model or chassis. The computerized summaries shall contain no identifying symbols which will permit identification of "accidents" reported by a single manufacturer.

2. For the sole purpose of developing safety standards for television receivers and not for public disclosure, the following employees of UL shall be permitted access to all of the "accident reports" and data submitted to the Commission by the 16 television manufacturers: Mr. S. David Hoffman, Mr. John Stevenson, Mr. Steven Coen and Ms. Frances Newell. These four employees of UL will make use of such "accident reports" and data only in connection with the development of safety standards for television receivers and will not disclose the "accident reports" or data nor make any written or oral reports of the contents thereof, to any person other than an employee of the Commission. No other written or oral reports will be prepared by these four employees of UL, which will in any way, directly or indirectly, identify the

manufacturer, model or chassis number of any television receiver alleged to have been involved in any "accident" or the number of "accidents" allegedly associated with any particular manufacturer, model or chassis.

3. Within ten days of the date hereof, the Commission shall furnish copies of the "Report on Analysis of TV Accident Data to Consumer Product Safety Commission, dated April 25, 1975 by Robert A. Yearance" ("the Yearance Report") to counsel for all plaintiffs. Counsel for each plaintiff shall have ten days from the date he is furnished a copy of the Yearance Report within which to object to its disclosure. If any objection is filed, the Yearance Report shall not be disclosed to anyone without further order of this Court. If no objection is filed, copies of the Yearance Report may be forwarded to UL and those assisting UL in the development of safety standards for television receivers.

4. Copies of this Order shall be furnished to Messrs. Hoffman, Stevenson and Coen, and Ms. Newell, and all others assisting UL in the development of safety standards for television receivers, prior to the time they are given access to data and reports covered by this Order.

5. This Order shall not, in any way, be used by anyone to prejudice plaintiffs' legal position that the "accident reports" and data covered by this Order are inaccurate, misleading and immune from disclosure under applicable law.

/s/ JAMES L. LATCHUM
James L. Latchum
Chief Judge

PRELIMINARY INJUNCTION

On the basis of findings of fact and conclusions of law set forth in the Court's opinion of this date entered in these cases, it is

ORDERED

1. That pending final hearing and determination by the Court or until further order of the Court, the defendant, Consumer Product Safety Commission ("Commission"), its members, agents, officers, employees and all other persons in active concert and participation with them are hereby enjoined from disclosing to the public in any manner:

(a) Any data submitted by plaintiffs to the defendant Commission in response to a special order issued May 13, 1974;

(b) Any data submitted by plaintiffs to the Commission in response to a subpoena duces tecum issued by the Commission on July 26, 1974; and

(c) Any report, extraction, computer analysis, or other document or documents purporting to be a summary or compilation of the data previously supplied to the Commission described in sub-paragraphs (a) and (b) above.

2. Provided, however, the Commission is not enjoined hereby from making certain limited disclosures to Underwriters Laboratories, Inc. ("UL"), the entity retained by the Commission to develop safety standards for television receivers under 15 U.S.C. § 2056, upon the following terms and conditions:

(a) UL and those assisting in development of safety standards for television receivers shall be permitted access to computerized summarizes of "accident reports" submitted to the Commission in response to the Commission's July 26, 1974 subpoena duces tecum (served on

16 television manufacturers) in a form that does not, directly or indirectly, identify the manufacturer, model or chassis number of any television receiver alleged to have been involved in any "accident" or the number of "accidents" allegedly associated with any particular manufacturer, model or chassis. The computerized summaries shall contain no identifying symbols which will permit identification of "accidents" reported by a single manufacturer.

(b) For the sole purpose of developing safety standards for television receivers and not for public disclosure, the following employees of UL shall be permitted access to all of the "accident reports" and data submitted to the Commission by the 16 television manufacturers: Mr. S. David Hoffman, Mr. John Stevenson, Mr. Steven Coen and Ms. Frances Newell. These four employees of UL will make use of such "accident reports" and data only in connection with the development of safety standards for television receivers and will not disclose the "accident reports" or data nor make any written or oral reports of the contents thereof to any person other than an employee of the Commission. No other written or oral reports will be prepared by these four employees of UL, which will in any way, directly or indirectly, identify the manufacturer, model or chassis number of any television receiver alleged to have been involved in any "accident" or the number of "accidents" allegedly associated with any particular manufacturer, model or chassis.

3. Provided further, however, that the Commission is not enjoined hereby from public disclosure of the "Report on Analysis of TV Accident Data to Consumer Product Safety Commission," dated April 25, 1975 by Robert A. Yereance (the "Yereance Report") so long as that Report or any accompanying information does not in any way, directly or indirectly, identify the manufacturers, model or chassis number of any television receivers alleged to have been involved in any "accidents" allegedly associated with any particular manufacturer, model or chassis.

4. Copies of this preliminary injunction shall be furnished to Messrs. Hoffman, Stevenson and Coen, and Ms. Newell, and all others assisting UL in the development of safety standards for television receivers forthwith.

Dated: October 23, 1975.

/s/ James L. Latchum
JAMES L. LATCHUM,
Chief Judge

LATCHUM, Chief Judge

In these thirteen separate actions, each plaintiff, a manufacturer of television receivers, seeks a preliminary injunction restraining the Consumer Product Safety Commission ("Commission"), its members and officers from disseminating certain information to the public which the plaintiffs contend is privileged, confidential, misleading and inaccurate.

Congress, in 1972, enacted the Consumer Product Safety Act (the "Act"), 15 U.S.C. § 2051 et seq., in order to "establish comprehensive and effective regulation over the safety of unreasonably hazardous consumer products." [1] To implement and administer this legislative policy, the Act established the Commission as an independent regulatory agency. Shortly after its creation, the Commission became concerned about the safety of television sets. During the spring and summer of 1974, the Commission sought and obtained television-related accident data from television manufacturers in three ways: by a general public request for information, by a special order pursuant to 15 U.S.C. § 2076(b)(1), and finally by the issuance of subpoenas duces tecum pursuant to 15 U.S.C. § 2056(b)(3). Upon receipt of such information, the data was consolidated and a computer printout was prepared which listed the alleged accidents separately. On March 28, 1975, the Commission decided to release to the public the bulk of the television-related accident

[1] H.R. Rep. No. 1153, 92d Cong., 2d Sess. 26 (1972). The purposes of the Act are:

> "(1) to protect the public against unreasonable risks of injury associated with consumer products;
>
> (2) to assist consumers in evaluating the comparative safety of consumer products;
>
> (3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and
>
> (4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries." 15 U.S.C. § 2051(b).

material in its possession which it had gathered from the plaintiffs.

Subsequently, each of the thirteen plaintiffs brought a suit against the Commission [2] for an injunction prohibiting the public dissemination of the information obtained from each on the ground that such information was privileged, confidential, misleading and inaccurate. The thirteen actions were consolidated [3] for a hearing on plaintiffs' motions for preliminary injunctive relief. The defendants also consented to the entry of a temporary restraining order [4] prohibiting the public disclosure pending the Court's decision on plaintiffs' present motions.[5]

I. BACKGROUND

In March 1974, the Commission issued a public notice [6] announcing that it would hold a public hearing to investigate the hazards encountered during the operation of television receivers and to consider the necessity of developing safety standards for such receivers. By this

[2] In addition to the Commission, the following members, officers and employees were named as defendants: Richard O. Simpson, Chairman, Constance B. Newman, Vice Chairman, R. David Pittle, Lawrence M. Kushner, Barbara Hackman Franklin, Commissioners, Sadye E. Dunn, Secretary, and Vince DeLuise, Freedom of Information Officer. They will be referred to collectively as the "Commission" or "defendants."

[3] Docket Item 10 (C.A. No. 75-104).

[4] Docket Item 3 (C.A. No. 75-104). The temporary restraining order was later modified to permit release of the gathered information to four employees of Underwriters Laboratories, Inc., which had been retained by the Commission to develop safety standards for television receivers. In addition the data without identification of manufacturer, model or chassis number was authorized to be released to Underwriters Laboratories, Inc. and other individuals involved in developing the safety standards. Docket Item 34 (C.A. No. 75-104).

[5] Defendants also moved for summary judgment in each case (Docket Item 35, C.A. No. 75-104), but these motions are not presently before the Court. (Docket Item 42, p. 3, C.A. No. 75-104).

[6] 39 Fed. Reg. 10929 (March 22, 1974).

notice, the Commission sought certain technical information and TV-related accident data from manufacturers of television sets and the component parts thereof. The notice described the accident data sought in part as follows:

> "Although the hearing is intended to emphasize fires and shocks related to TV sets, information pertaining to all aspects of TV set safety may be submitted (with the exception of radiation hazards . . .).
>
> * * * *
>
> . . . In particular, each TV manufacturer is requested to submit all accident reports collected since the 1969 hearings held by the National Commission on Product Safety. If present data records procedures differ from the method proposed in the 1969 'Electronic Industry Ad Hoc Engineering Report on Television Fires' which was submitted to the National Commission on Product Safety, place (sic) indicate the procedures used." [7]

Although a few manufacturers complied with the Commission's general request for data, their principal response consisted of a six page summary of accident data supplied by the Electronics Industry Association ("EIA").[8]

After reviewing the data voluntarily submitted, the Commission concluded that "the information submitted to the Commission by the EIA on behalf of the [Companies did] not satisfy the Commission's request." [9] Thus on May 13, 1974, the Commission, acting pursuant to 15 U.S.C. § 2076(b)(1),[10] sent special orders to twenty-

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[7] *Id.* 10930.

[8] Par. 5 Affidavit of Constance B. Newman, Vice Chairman of the Commission ("Newman Aff'd") Docket Item 27, C.A. No. 75-112.

[9] *E.g.*, Special Order of Commission to General Electric Company. Docket Item 11A, Ex. A-1, C.A. No. 75-136.

[10] 15 U.S.C. § 2076(b)(1) provides: "The Commission shall have the power—(1) to require, by special or general orders, any person to submit in writing such reports and answers to questions as

five manufacturers of television receivers and components.[11] The information sought by these special orders was broken down into six categories: (1) TV-related accident data, (2) Current, future-planned and suggested TV-related safety standards, (3) Quality control and quality assurance plans, (4) Service technicians, (5) Improvement plans for presently used sets, and (6) Specific technical areas.[12]

The instructions for the TV-related accident data category provided:

> "You are requested to submit all accident reports collected since the 1969 hearings held by the National Commission on Product Safety. If present data recording procedures differ from the method proposed in 1969 'Electronics Industry Ad Hoc Engineering Report on Television Fires' which was submitted to the National Commission on Product Safety, please indicate the procedures used." [13]

In the cover letter [14] accompanying the special orders, the Commission "[recognized] that some of the information to be submitted [might] be proprietary" and referred the manufacturer to certain statutory provisions [15] designed to protect confidential information supplied to the government. The Commission encouraged compliance by stating in the cover letter:

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the Commission may prescribe; and such submission shall be made within such reasonable period and under oath or otherwise as the Commission may determine."

[11] Of the plaintiffs here, only RCA did not receive a special order. Newman Aff'd, par. 6.

[12] *E.g.*, Special Order of Commission to General Electric Company. Docket Item 11A, Ex. A-1, C.A. No. 75-136.

[13] *Id.*

[14] *E.g.*, Letter of Richard O. Simpson, Chairman of the Commission, to General Electric Company, May 13, 1974. (Docket Item 11A, Ex. A-1, C.A. No. 75-136).

[15] 15 U.S.C. § 2055(a)(1), 5 U.S.C. § 552(b)(4) & (7), 15 U.S.C. § 2055(a)(2), and 18 U.S.C. § 1905.

"This information will be received in confidence. It will not be placed in a public file and will not initially be made available to the public."

However, the possibility of a request for public access to this information by way of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, was noted, and the manufacturers were instructed to identify data claimed to be exempt from public disclosure and to "substantiate" any such claims. Claims of confidentiality accompanied the response of most manufacturers.[16]

Again, the Commission was not satisfied with the data supplied by the manufacturers pursuant to the special orders and the companies were notified as follows:

"The Commission has reviewed your response to its May 13, 1974, Special Order requesting information on TV-related fire and shock hazards. Although we recognize your effort to comply with the terms of the Special Order, technical analysis shows that your response fails to provide sufficient information with respect to certain questions enumerated in the Order.

Accordingly, the Commission has decided to issue the attached subpoena, pursuant to section 27(b)(3) of the Consumer Product Safety Act [15 U.S.C. § 2076(b)(3)] which specifies the additional information required.

It should be noted that failure to respond to the subpoena within the time specified therein may, pursuant to section 27(c) of the Act [15 U.S.C. § 2076(c)] lead to entry of a court order against you directing compliance with the Commission's subpoena." [17]

Thus, on July 26, 1974 subpoenas duces tecum were issued to the plaintiffs and three other TV manufac-

[16] *E.g.*, Letter of H. C. Burgess, General Electric Co., to Richard O. Simpson, Chairman of the Commission, May 29, 1974. Docket Item 11A, Ex. A-2, C.A. No. 75-136.

[17] *E.g.*, Letter of Sadye E. Dunn, Secretary of the Commission, to H. B. Walden, General Electric Co., July 26, 1974 (Docket Item 11A, Ex. A-3, C.A. No. 75-136).

turers [18] requiring the production of certain technical information and all television-related accident data [19] as follows:

"All TV-related accident reports collected since the 1969 hearings held by the National Commission on Product Safety. The term 'reports', includes, but is not limited to, all physical forms of: correspondence, letters; telegrams; cables; tapes; recordings; photographs; films; memoranda, including writeups of telephone calls and other oral communications; press releases, bulletins; newspaper, magazine or other journalistic articles; diaries; charts; contracts; agreements; and any other writing prepared by any person or persons, including those by insurance firms, investigators, laboratories and researchers; and includes both originals and copies whether or not sent or received. The term 'reports' includes those reports maintained on a form (sample attached) designed by members of the Electronics Industries Association (EIA) and submitted to the National Commission on Product Safety in November 1969

[18] Sony Corp., Sanyo Electric, Inc., and Wells-Gardner Electronics Corp. were subpoenaed but did not seek to bar public disclosure of data which they forwarded to the Commission. Newman Aff'd, par. 8. Apparently, the Commission did not order all manufacturers of TV sets sold in this country to submit accident reports. Deposition of Robert L. Northedge ("Northedge Dep.") p. 78. Northedge, an electrical engineer, employed by the Bureau of Engineering Science of the Commission was project manager of the Commission's investigation of television hazards.

[19] *E.g.*, Subpoena duces tecum addressed to H. B. Walden, General Electric Co., July 26, 1974 (Docket Item 11A, Ex. A-3, C.A. No. 75-136). Prior to serving the subpoenas the Commission had been warned of the confusion that might result from the problem of defining a TV-related accident. Letter of A. E. Allen, Philco-Ford Corp. to the Commission, May 28, 1974 appended to Joint Memorandum of GTE Sylvania and Aeronutronic Ford Corp. in support of motion for preliminary injunction. (Docket Item 24, C.A. No. 75-104). Evidently, there is no standard definition of TV-related accidents. Northedge Dep. pp. 29-32. Moreover, the brief preface of the subpoenas referred to the Commission's "investigation of shock and fire hazards associated with television receivers," but the body of the subpoenas designated "[a]ll TV-related accident reports."

> and also those reports maintained on any and all forms substituted for the attached sample EIA form." [20]

Standards of reliability and accuracy for the data sought were indicated on sample data forms accompanying the subpoenas.

> "The purported information in this form is based upon such reports as are available but in many cases will be incomplete, unverified and even incorrect." [21]

The Commission sought unverified information intentionally because it wanted to obtain as large a data base as possible.[22] Again, accident reports supplied in compliance with the subpoena duce tecum were accompanied by claims of confidentiality.[23] However, the Commission did not mention the issue of confidentiality in either the subpoena or the cover letter.

In order to reduce the information contained on the approximately 120,000 pieces of paper received in response to the subpoenas duces tecum to a manageable form, the Commission retained Tracor-Jitco, Inc. ("Tracor") to extract and categorize the data contained in the accident reports.[24] This consolidation of information was designed to assist the organization engaged in developing safety standards and also to make the accident data more meaningful to members of the public who might inspect it under the Freedom of Information

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[20] The description of TV-related accident data was identical for each subpoena. On the other hand, the technical information requested did vary slightly from manufacturer to manufacturer, but, generally, it corresponded to the materials sought in the May 13, 1974 special order. (Newman Aff'd, par. 9.)

[21] Docket Item 35, C.A. No. 75-104.

[22] Northedge Dep. pp. 169, 200, 258.

[23] Newman Aff'd. par. 10; *E.g.*, Letter of F. R. Wellner, General Electric Co., to Sadye E. Dunn, Secretary of the Commission, October 22, 1974 (Docket Item 11A, Ex. A-4, C.A. No. 74-136).

[24] Newman Aff'd, pars. 10, 15.

Act.[25] Data summary sheets were prepared by gleaning from accident reports the appropriate responses for the several categories.[26] Although many reports did not contain enough data to answer each question,[27] the Commission was seeking as much information in manageable form as possible.

Tracor was responsible for transferring information from the accident reports to the data summary sheets from which the computer cards could be keypunched. In order to ensure that Tracor's employees performed the task accurately, Tracor's supervisor initially reviewed every sheet and later performed random checks by comparing the extracted data against the original report. Also, Robert A. Yereance, a consultant retained by the Commission, screened the same sheets that the Tracor supervisor examined. Finally, Robert L. Northedge, the Commission project manager, reviewed some of the abstracts.[28]

Then, the information on the data summary sheets was keypunched by another organization under contract with the Commission and was read into a Commission computer program which produced a printout of the in-

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[25] Northedge Dep. pp. 24-25; Memorandum of Robert L. Northedge to Enid Rubenstein of the Commission, December 3, 1974 (Docket Item 11A, Ex. B, C.A. No. 75-136).

[26] A memorandum from Edward J. Cull, Office of General Counsel, to the Commissioners ("Cull Memorandum") 2, March 21, 1975 (Docket Item 11A, Ex. A-7, C.A. No. 75-136) lists twenty-five categories of extracted information: (1) file number assigned to the accident, (2) manufacturer, (3) model numbers, (4) chassis number, (5) TV type (color or black and white), (6) chassis type, (7) switch type, (8) model type, (9) cabinet material, (10) year of manufacture, (11) owner's initials, (12) failed part, (13) location of failed part in set, (14) prior indication of trouble, (15) repaired prior to accident, (16) electric power status, (17) time in electric power status, (18) type of accident, (19) time of day, (20) state, (21) location, (22) number of injuries, (23) number of fatalities, (24) damage and (25) amount and type of claims. The Newman affidavit indicates that there were twenty-seven categories of information. Newman Aff'd, par. 15(a).

[27] Northedge Dep. pp. 190-94.

[28] *Id.* pp. 216-20. It was not considered necessary to review every data sheet. *Id.* 219.

formation previously coded.[29] The printout was reviewed but only about fifty individual accident reports were checked against their summaries on the computer printout.[30]

At this point, there were 10,765 separate line items;[31] each line item represented a separate report. Tracor next undertook a duplication search. The duplication search was carried out by selecting a particular category of information and grouping the reports according to a common parameter within that category. For example, the accidents reported were grouped by the states in which they occurred; they were also grouped alphabetically by the initials of the victim; listing model numbers consecutively constituted another method. After grouping, summaries exhibiting the same classifying parameters were inspected for other similarities. When the comparison indicated that the reports might be related, the original accident reports were examined.[32] As a result of this endeavor, separate reports of the same accident were consolidated and exact duplicates were eliminated. This winnowing procedure reduced the number of accident reports to 7,620.[33]

Tracor also classified as confidential the identity of the victims and any documents encompassed by the work product doctrine and the attorney-client privilege.[34] This information, therefore, has been excluded from the filed accident reports and computer printout.[35]

A Commission consultant, Robert A. Yereance, prepared a report captioned "Analysis of TV Accident

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[29] At least 99 percent of the accident reports summarized on the computer printout were obtained through the subpoenas duces tecum. *Id.* p. 247.

[30] *Id.* p. 112.

[31] *Id.* p. 221.

[32] *Id.* pp. 223-225.

[33] Newman Aff'd, par. 17.

[34] *Id.* par. 15(c).

[35] *Id.* par. 17.

Data" [36] ("Yereance Report"), the purpose of which was stated to be as follows:

> "To assist in the processing of the TV-related accident data and to analyze and summarize the data following completion of the data processing, the Commission hired a consultant, Robert A. Yereance. Mr. Yereance has prepared for the benefit of the offeror which has been selected to develop a TV standard, a report entitled, 'Analysis of TV Accident Data.' This report, which is based upon the accident data submitted to the Commission by the manufacturers, analyzes that data in terms of the number of television sets in use in the United States and the relative incidence of television-related accidents. The report does not identify a particular manufacturer, TV model, or chassis; it contains only industry-wide statistics. The purposes of this report were to answer basic questions concerning TV-related hazards, to provide a picture of the magnitude or relative significance of hazards that exist in TV sets currently in use, and to point out information which should prove valuable in the development of a standard to reduce hazards." [37]

The requirement that manufacturers submit reports of dubious validity apparently reflected the Commission's concern that limiting the subpoenas to only verified reports would result in a data base which would be too small for proper analysis.[38] Also, it was thought that trends indicating design inadequacies of a particular

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[36] Docket Item 41, C.A. No. 75-104. The temporary restraining order initially covered the Yereance Report. See note 4, *supra*. However, subsequent modification of that order (Docket Item 34, C.A. No. 75-104) provided that the Yereance Report, absent objection from plaintiffs, could be forwarded to Underwriters Laboratories, Inc. and those individuals assisting that organization in the development of safety standards.

[37] Newman Aff'd, par. 18.

[38] *Id.* par. 9; Northedge Dep. pp. 169, 200, 258.

manufacturer might appear.[39] However, the Commission never attempted to distinguish the verified reports from the unverified reports.[40] Indeed, of the more than 7,600 tabulated reports, the Commission investigated less than 100 of them.[41]

Furthermore, the confusion generated by the lack of a clear definition of "TV-related accident" [42] is aptly reflected in the following dialogue between counsel for RCA and the Commission's project manager, Robert L. Northedge:

> "Q. [By Mr. Tiger] Mere speculation is enough to characterize it as a TV-related accident?
>
> A. [By Mr. Northedge] For the purposes for which we subpoenaed this information, yes.
>
> Q. Is it proper to characterize as a TV-related accident the situation where someone is watching television while smoking a cigarette and the lit cigarette falls in the cushioning of a chair and starts a fire?
>
> (Whereupon, the reporter read the pending question.)
>
> THE WITNESS: I wouldn't think that would be proper.
>
> Q. [By Mr. Tiger] What if, during the fire, the TV caught on fire?
>
> A. [By Mr. Northedge] It would be classified as a TV-related accident.
>
> Q. Is it proper to characterize as a TV-related accident the situation where a fire results from defective wiring in the house and the point of origin of the fire happens to be in the area of the television set?

[39] Northedge Dep. pp. 242-43.

[40] *Id.* p. 262.

[41] *Id.* p. 43.

[42] See note 19 *supra.*

> A. Yes, because it is possible that the TV could have—we don't know, but it is possible that the TV could have caused the short circuit in the wall outlet.
>
> Q. What if the TV didn't cause the short circuit in the wall outlet, it was caused by something else?
>
> A. Well, in many cases we don't know this so it is entered as a TV-related fire.
>
> Q. Is it proper to characterize as a TV-related accident, the situation where a burning candle sitting on top of a television set melts the cabinet?
>
> A. Yes." [43]

Thus, it appears that an accident which would have been "TV-related" in one view could feasibly be perceived by another as not being "TV-related." That the Commission was well aware of the confusion and its consequences is clearly reflected in an internal memorandum which reads in part:

> "It should be noted that some manufacturers appear to have submitted accident reports pertaining to fire and shock incidents only. Whereas, other manufacturers have submitted incident reports on TV tube implosions, carrying handle failures; (sic) instability of TV stands, etc., as well as incident reports on fire and shock." [44]

Moreover, although some manufacturers did not comply fully with the subpoena, the Commission never made any effort to compel the appropriate response[45] because it had made "a technical judgment that sufficient information [had] been collectively submitted by the sixteen manufacturers to significantly facilitate the Commis-

[43] Northedge Dep. pp. 120-21. The following would also be classified as "TV-related accidents": cutting a finger on a screw protruding from a TV cabinet, *id.* p. 35; sustaining a hernia while carrying a TV set, *id.* pp. 35, 116; fire caused by a candle that had been placed on top of a TV cabinet, *id.* pp. 172-73.

[44] Bureau of Engineering Sciences of the Commission, "Report on Subpoena Compliance," Dec. 3, 1974 (Docket Item 11A, Ex. B, C.A. No. 75-136).

[45] Northedge Dep. pp. 259-61.

sion's regulatory development activities for TV receivers." [46]

Finally, the Commission's disclosure accompanying the release to the public of the data submitted by manufacturers who are not parties to these actions focused on another critical source of inaccuracy:

> "The television accident statistics being released to you may be misleading because some television manufacturers were more conscientious theu (sic) others in maintaining television accident files." [47]

Notwithstanding this melange of inaccuracies, the Commission reached a final decision on March 28, 1975 [48] to release to the public the TV-related accident data and the computer printout compiled from the information ob-

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[46] Memorandum of Robert L. Northedge to Enid Rubenstein of the Commission, December 3, 1974 (Docket Item 11A, Ex. B, C.A. No. 75-136).

[47] Newman Aff'd, par. 28. "It is recognized that some television manufacturers have apparently been more conscientious in compiling accident data than others and thus, the release of the accident data might be misleading in some cases, i.e., a higher accident rate for one particular TV model than similar models because more complete records were maintained." Cull Memorandum, p. 7.

[48] Newman Aff'd, par. 19. The Commission on August 21, 1974 apparently had promised the plaintiffs that the Secretary would first make an initial determination of the disclosure issues and that the Secretary's decision could be appealed to the Commission. *E.g.*, Letter of Sadye E. Dunn, Secretary of the Commission to H. B. Walden, General Electric Co., August 2, 1974 (Docket Item 11A, Ex. A-5, C.A. No. 75-136). Despite this promise, the decision on disclosure was made by the Commission initially and the possibility of an appeal was foreclosed. See Cull Memorandum, p. 4. Thus, no hearing was held on the claims asserted by the plaintiffs. Furthermore, the letter notifying the plaintiffs of the Commission's decision to release the accident data provided only for a minimum of ten days before disclosure. *E.g.*, Letter of Vince DeLuise, Freedom of Information Director of the Commission to Merle W. Kremer, GTE Sylvania Inc., April 8, 1975 (Docket Item 35, C.A. No. 75-104). Telegrams from the Commission eventually fixed May 1, 1975 as the proposed date of disclosure. (Docket Item 11A, Exs. A-8, A-9, C.A. No. 75-136).

tained from the plaintiffs.[49] In deciding to release this information to the public, the Commission relied [50] upon a memorandum [51] prepared by its Office of General Counsel. The reasons for the disclosure are not clearly and explicitly set forth in this memorandum. However, it does state, "The release of the accident data would assist consumers to better evaluate the safety of TVs." [52] No other affirmative reason in support of disclosure was offered.[53]

In her affidavit of June 27, 1975 submitted during the course of this litigation, the Commission's Vice Chairman also asserted that "disclosure of the information would serve the important purpose of informing the public that hazards may exist in operating television receivers," and "would provide consumers with an indication of the kinds of questions that they should consider when purchasing a television set" and "that the large data base of TV-related accidents that [the Commission] had compiled would be useful to other parties interested in investi-

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[49] These materials will be referred to as "information" or "accident data." The Commission evidently does not intend to release the technical information that it obtained from the plaintiffs. Newman Aff'd, par. 20; Docket Item 42, p. 53, C.A. No. 75-104. After the decision to disclose was reached by the Commission, the Yereance Report was prepared.

[50] Newman Aff'd. par. 19.

[51] Cull Memorandum. A copy of this memorandum is included in what the Commission terms its administrative record in each case. *E.g.*, Docket Item 35, C.A. No. 75-104.

[52] *Id.* p. 5. Also the Commission's letter informing the plaintiffs of its disclosure decision mentioned "public health and safety" as a reason for disclosure. *E.g.*, Letter of DeLuise, Freedom of Information Director of the Commission to Merle W. Kremer, GTE Sylvania, Inc., April 8, 1975 (Docket Item 35, C.A. No. 75-104).

[53] The bulk of the memorandum purports to establish that the Commission can release the data to the public under the Freedom of Information Act, 5 U.S.C. § 552. The impact of the Freedom of Information Act on the present actions will be discussed later in this opinion. See notes 73-76 and accompanying text, *infra*.

gating the potential hazards associated with television receivers." [54]

On the other hand, the numerous sources of inaccuracy compelled the Commission's consultant, Robert A. Yereance, to disagree with the Commission's decision to disclose the data. According to Northedge, "he didn't feel that much of it should be released at all." [55] Furthermore, even Northedge concluded that the public could not meaningfully utilize the data as a valid basis for comparing the safety of the various manufacturers' televisions.[56] In sum, it is apparent that the information obtained from the plaintiffs which the Commission proposes to release would be misleading to the consumer who attempted to use it for evaluating the relative safety of TV receivers manufactured by the plaintiffs.

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[54] Newman Aff'd, par. 29. The propriety of considering these justifications raised initially in these proceedings is considered later. See notes 64 and 71 and accompanying text *infra*.

[55] Northedge Dep. p. 146.

[56] *Id.* pp. 179, 256. This point was conceded by the defendants at oral argument (Docket Item 42, p. 74, C.A. No. 75-104). Northedge's final comments at his oral deposition clearly shows that he, as project manager, could discern no benefit to the public of such disclosures. For example (Northedge Dep. pp. 276-277):

> "Q. [By Mr. Palmer] Well, you have previously testified that the data is not meaningful as a basis for consumers to make comparative safety assessments among the different manufacturers. What purpose is served by the release of the identity of particular manufacturers other than to facilitate such a concededly invalid comparison?
>
> A. [By Mr. Northedge] I don't know what purpose there would be.
>
> Q. In other words, you can't think of any purpose that would be served by that?
>
> A. Offhand, I cannot think of any purpose."

The Commission has offered plaintiffs the opportunity to come forward with information that would "substantiate" their claims of inaccuracy or duplication. Aff'd of Sheldon D Butts, Assistant Secretary of the Commission, par. 2 (Docket Item 35, C.A. No. 75-104); Newman Aff'd, par. 27.

II. Plaintiffs' Contentions

The manufacturers have made numerous arguments in support of their contentions that disclosure of this information would be improper and that issuance of a preliminary injunction prohibiting disclosure would be appropriate.[57]

First, the plaintiffs assert that release of the information is prohibited by 15 U.S.C. § 2055(a)(2) which provides that information obtained by the Commission which "relates to a trade secret or other matter referred to in section 1905 of Title 18 shall be considered confidential and shall not be disclosed." The accident reports are viewed as being within a protected category.

Second, the Freedom of Information Act, 5 U.S.C. § 552, and 15 U.S.C. § 2055(a)(1) which refers to the FOIA are perceived as conferring upon the plaintiffs an affirmative right to block public release of the information.

Third, the Commission is charged with having violated 15 U.S.C. § 2055(b)(1) which in part requires the Commission to "take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of [the Act]."

Fourth, the manufacturers challenge the procedure followed by the Commission in deciding to release the data. The Commission is said to have failed to promulgate rules to accommodate its information dissemination functions as required by FOIA, 5 U.S.C. § 552(a)(1), and to have failed to provide notice thirty days prior to public disclosure of the information and to supply a summary of the information destined for disclosure as mandated

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[57] Although the manufacturers individually have raised different issues and stressed different arguments, their contentions are considered collectively. Also, while raising the same general issue individual plaintiffs may have emphasized uniquely perceived nuances. Therefore, even though the principal arguments are indicated, the list should not be viewed as an all inclusive catalogue.

by 15 U.S.C. § 2055(b)(1), and to have failed to comply with an earlier promise of an administrative appeal.

Fifth, the plaintiffs maintain that the Commission is estopped from disclosing the information because of the Commission's representation to the manufacturers that the material obtained would not be made public.

Finally, an accusation of having violated the Due Process Clause of the Fifth Amendment is brought against the Commission. This constitutional argument is founded upon both alleged procedural deficiencies and the arbitrary nature of the Commission's decision to make public the previously confidential information.

III. Jurisdiction and Scope of Review

Although the plaintiffs have pleaded several jurisdictional grounds,[58] the Court finds that it has jurisdiction of this matter by virtue of 28 U.S.C. § 1337, which provides:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce. . . ."

First, the general purpose of the Act to protect individuals who use consumer goods suggests a Congressional intention to regulate commerce.[59] Second, and more importantly, the regulation of commerce aspect of this legislation was explicitly set forth in 15 U.S.C. § 2051(a)(6).

> "The Congress finds that—
>
> * * * *
>
> regulation of consumer products the distribution or use of which affects interstate or foreign commerce is necessary to carry out this chapter."

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[58] Among the asserted bases for jurisdiction are 28 U.S.C. §§ 1331, 1332, 1346, 1361, 2201-02 and 5 U.S.C. §§ 702, 704. While some plaintiffs failed to mention the source of jurisdiction upon which the Court relies, it is nevertheless appropriate for the Court to recognize the applicability of § 1337 to those plaintiffs' claims. *Cf.* Sun Printing & Publishing Ass'n v. Edwards, 194 U.S. 377 (1904).

[59] *See*, e.g., S. Rep. No. 835, 92d Cong. 2d Sess. 7 (1972); H. R. Rep. No. 1153, 92d Cong. 2d Sess. 21-24, 26-27 (1972).

Thus, it is clear that the Act can be included under the umbrella of § 1337.[60] Furthermore, § 1337 constitutes an appropriate basis for the review of an administrative determination. Davis v. Romney, 490 F.2d 1360 (C.A. 3, 1974); General Motors Corp. v. Volpe, 457 F.2d 922 (C.A. 3, 1972), *aff'g* 321 F.Supp. 1112 (D. Del. 1970).

Closely akin to the issue of jurisdiction is the question of plaintiffs' standing to seek the requested relief.[61] First, adverse publicity and harm to commercial reputation which would likely result from the proposed disclosure would amount to "injury in fact." Second, the requirements of 15 U.S.C. § 2055(b)(1) that the Commission take reasonable steps to assure accuracy and that disclosure be fair in the circumstances reflect a concern for the impact that inaccuracies and misleading public releases might have on manufacturers whose produces were being investigated by the Commission. Thus, the interests which the plaintiffs seek to preserve are "arguably within the zone of interests to be protected" by 15 U.S.C. § 2055(b)(1). Data Processing Service v. Camp, 397 U.S. 150, 151-154 (1970); Merriam v. Kunzig, 476 F.2d 1233 (C.A. 3, 1973), *cert. den. sub nom.* Gateway Center Corp. v. Merriam, 414 U.S. 911.

Judicial review of administrative actions, of course, is governed by the Administrative Procedures Act, specifically 5 U.S.C. §§ 701-706.[62] It is clear "that judicial

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[60] It should also be noted that when the Act was codified in the United States Code, it was placed in Title 15, which deals with trade and commerce.

[61] See also 5 U.S.C. § 702 (Administrative Procedure Act) which provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

[62] 5 U.S.C. § 701(a) provides:

> This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or

[Footnote continued on page 110]

review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967). No statute prohibits review of Commission action, and nothing has been found to suggest that Congress intended to confer upon the Commission unreviewable discretion as defined in 5 U.S.C. § 701(a)(2), a provision which has been given a very narrow interpretation. *E.g.*, Adams v. Richardson, 480 F.2d 1159 (C.A.D.C., 1973). Because the Commission plans no further proceedings before releasing the data, the finality requirement has also been satisfied.

Although plaintiffs are requesting a preliminary injunction, this action, nevertheless, amounts to a review of an administrative determination, and while the heavy burden imposed on a party seeking a preliminary injunction must be met fully, it is still necessary to define with some precision the scope of review open to this Court.

The appropriate scope of review of the Commission's decision to disclose the accident data is defined in 5 U.S.C. § 706(2)(A):

> "The reviewing court shall—
>
> * * * *
>
> (2) hold unlawful and set aside agency action, findings and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Thus, the Court can prevent disclosure of accident data only if the Commission's actions fall beyond the per-

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[61] [Continued]

(2) agency action is committed to agency discretion by law.

5 U.S.C. § 704 provides in part:

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."

missible discretionary range defined by the "arbitrary and capricious" standard. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413-15 (1971); Camp v. Pitts, 411 U.S. 138 (1973); A. O. Smith v. FTC, C.A. No. 75-15 (D. Del., filed September 22, 1975).[63] In Overton Park, *supra*, at 416, district courts were instructed that in applying the "arbitrary and capricious" standard, they "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Furthermore, "[a]lthough this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Id.* See Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285-86 (1974). Therefore, although the Court must review the events below with great care, the plaintiffs, nevertheless, must make a clear and convincing showing that the Commission erred and exceeded the bounds of its discretion in deciding to release the accident data.

Also, it is necessary to determine what materials may be considered in reviewing the Commission's actions. "In applying [the 'arbitrary and capricious'] standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, *supra* at 142. This language, the Commission contends,[64] precludes consideration of the Northedge Deposition and the affidavits submitted by both the plaintiffs and defendants. However, in both Camp v. Pitts, *supra* at 142-

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[63] The only other conceivable standards are the "de novo" review provided for by 5 U.S.C. § 706(2)(F) and the "substantial evidence" test of 5 U.S.C. § 706(2)(E). Both Overton Park, *supra*, and Camp v. Pitts, *supra*, make it clear that these approaches are not applicable here. See A. O. Smith, *supra* at 5-9.

[64] Memorandum in Support of Defendants' Motions for Summary Judgment and Opposition to Plaintiff's (sic) Motion for Preliminary Injunction at 8-9, n.1 (Docket Item 35, C.A. No. 75-104).

143, and Overton Park,[65] *supra* at 420, the Supreme Court recognized that there are occasions when the reviewing court is justified in going beyond the limited administrative record. Although an inquiry of this nature should, as a general rule, be avoided, United States v. Morgan, 313 U.S. 409, 422 (1941); South Terminal Corp. v. EPA, 504 F.2d 646, 675 (C.A. 1, 1974); National Nutritional Foods Ass'n v. FDA, 491 F.2d 1141 (C.A. 2, 1974), *cert. den.* 419 U.S. 874, it is essential in this case in order for the Court to have sufficient information to consider rationally the Commission's actions. *See* Nuclear Data, Inc. v. AEC, 364 F.Supp. 423, 425 (N.D.Ill. 1973).[66]

Three sources of information not found in the record [67] have been offered to the Court; the deposition of the Commission's engineer and accident data program manager, Robert L. Northedge; the affidavit of Vice Chairman Newman; and affidavits of officers of the plaintiffs.[68]

[65] The present proceeding, as did Overton Park, *supra*, involves agency action that cannot be classified as either adjudicatory or rule making. See Texas v. EPA, 499 F.2d 289, 296 (C.A. 5, 1974).

[66] In somewhat similar circumstances, a district court has been ordered to hold an evidentiary hearing before applying the "arbitrary and capricious" standard. For example, in Charles River Park "A", Inc. v. HUD, 519 F.2d 935 (C.A.D.C., 1975), the plaintiffs sought to prohibit HUD from disclosing to Boston's Commissioner of Assessing certain financial information that had been submitted during the course of securing FHA-insured mortgages. The Court of Appeals instructed the reviewing court to conduct an evidentiary hearing but also ordered the review to be carried out under the "abuse of discretion" provision, also under 5 U.S.C. § 706(2)(A), which the Court for convenience referred to as the "arbitrary and capricious" standard. *Cf.* Maryland-National Capital Park & Planning Comm. v. U.S. Postal Service, 487 F.2d 1029 (C.A.D.C., 1973).

[67] The "record" here encompasses more than the materials contained in the Commission's purported official record. Internal Commission memoranda and even plaintiffs' communications to the Commission can be examined to determine if the Commission should have been aware of certain issues.

[68] The affidavits submitted by the plaintiffs are essential to establish irreparable harm required before a preliminary injunction can be issued. However, the Court has not considered plaintiffs' affidavits in evaluating the propriety of the Commission's actions.

Proper analysis of the uses of the Northedge Deposition and Newman Affidavit in these proceedings requires that descriptions of the data and the Commission's procedure for processing the data be separated from possible explanations of the Commission's decision to release the accident data. Before it can reasonably apply the appropriate legal standards, the Court must first be apprised of the nature of data collected, the value of the data and computer printout to someone studying TV-related accidents, and the means by which the Commission collected and processed the data. The Northedge Deposition and the first twenty-eight paragraphs of the Newman Affidavit provide that information. Neither probing the mental processes of the Commission's officials nor seeking knowledge outside the Commission's own limited sphere is involved.

On the other hand, paragraph 29 of the Newman Affidavit cannot be considered because it constitutes the most egregious type of "post-hoc rationalization" condemned in Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962), and SEC v. Chenery Corp., 318 U.S. 80 (1943). The record suggests and the Newman Affidavit clearly states that the Commission relied upon the Cull Memorandum in reaching the decision to disclose the accident data.[69] This memorandum offers the only substantially contemporaneous explanation for the decision.[70]

[69] Newman Aff'd, par. 19.

[70] It should be noted that the Cull Memorandum does not discuss all legal arguments offered to the Commission in opposition to disclosure. However, in an informal administrative proceeding, it is not mandatory that the substantially contemporaneous writing relied upon and adopted by the Commission specifically reject every contention. *Cf.* Consumers Union of the United States v. Consumer Product Safety Commission, 491 F.2d 810, 812 (C.A. 2, 1974).

The picture is further clouded by the Commission's failure to comply with its representation to the manufacturers that the Secretary would make the initial determination which in turn could be appealed to the full Commission. See note 48 *supra*. Deviations from ideal procedure have been viewed as a basis for relaxing the typically close confinement to the administrative record. Sierra Club v. Hardin, 325 F.Supp. 99 (D. Alaska 1971).

Denial of promised administrative appeal and the general inadequacy of the record as a factual basis for review have caused the

The other purposes set forth in the Newman Affidavit are "post-hoc rationalizations" which the Court is precluded from considering as a basis for administrative decision.[71]

IV. PRELIMINARY INJUNCTION

Before preliminary injunctive relief may be granted, plaintiffs must show (1) a reasonable probability of eventual success on the merits and (2) that they will suffer irreparable harm *pendente lite* if relief is not granted, and, furthermore, the Court must consider (3) the impact of its decision on other interested persons and (4) the public interest. Oburn v. Shapp, C.A. No. 75-1189 (C.A. 3, filed August 4, 1975) slip op. at 9-10; Delaware River Port Authority v. Transamerican Trailer Transport, Inc., 501 F.2d 917, 919-20 (C.A. 3, 1974); A. O. Smith Corp. v. FTC, 396 F.Supp. 1108, 1117-20 (D. Del. 1975) (appeal pending); Bowers v. Columbia General Corp., 336 F.Supp. 609, 613 (D. Del. 1971).

A. *Reasonable Probability of Eventual Success.*

> "It is not necessary that the moving party's right to a final decision after trial be wholly without doubt; rather, the burden is on the party seeking relief to make a *prima facie* case showing a reasonable probability it will prevail on the merits." Oburn v. Shapp, *supra*, slip op. at 10.

Congressional interest in securing manufacturers' cooperation[72] and establishing a harmonious but effective relationship between the manufacturers and the Commission is reflected in 15 U.S.C. § 2055(b)(1), which provides in pertinent part:

> "The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, [1] that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and [2] that such disclosure is fair in the circumstance and [3] reasonably related to effectuating the purpose of [the Act]."

Thus, before the Commission may release information to the public, a three step analysis must be satisfied. Failure to comply with any one of the standards means that disclosure would be improper.

At the outset, the Court is confronted by the Commission's oblique suggestion that § 2055(b)(1) may never apply where the information has been requested under the Freedom of Information Act, 5 U.S.C. § 552.[73] However, separate statutes regulating disclosure decisions of administrative agencies do have a significant and independent role. FAA v. Robertson, 43 U.S.L.W. 4833 (U.S. June 24, 1975). In *Robertson*, in spite of the language of the FOIA exception protecting matters "*specifically* exempted from disclosure by statute," 5 U.S.C. § 552(b)(3) (emphasis added), a statute[74] granting an agency discretion to withhold or release safety information to the

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Court to consider remanding the proceedings to the Commission. *See, e.g.*, Secretary of Labor v. Parino, 490 F.2d 885, 890-893 (C.A. 7, 1973); Shannon v. HUD, 436 F.2d 809 (C.A. 3, 1970). Both Overton Park, *supra*, and Camp v. Pitts, *supra*, conferred broad discretion without much guidance on the district courts to determine the appropriate procedures for clarifying the administrative record. A. O. Smith, *supra* at 27. Under the circumstances—a recently formed agency engaged in an informal proceeding—it does not seem necessary to remand the matter to the Commission. The Northedge Deposition and portions of the Newman Affidavit provide the Court with an adequate foundation for decision. Indeed, if these sources could not be used, it would be necessary to remand the case to the Commission with instructions to describe in detail the procedure followed in obtaining and processing the data.

[71] The Court does consider these arguments when it evaluates the public interest in denying or granting preliminary injunctive relief. See IV C, *infra*.

[72] *See, e.g.*, 118 Cong. Rec. 31378-79 (1972) (remarks of Representative Moss).

[73] Memorandum in Support of Defendants' Motion for Summary Judgment and Opposition to Plaintiff's (sic) Motions for Preliminary Injunction, 14, n.4 (Docket Item 35, C.A. No. 75-104). FOIA requests for the accident data have been received by the Commission. Newman Aff'd, pars. 11-14, 20.

[74] 49 U.S.C. § 1504.

public was found to have continuing viability.[75] The Supreme Court acknowledged that "Congress could appropriately conclude that the public interest was better served by guaranteeing confidentiality in order to secure the maximum amount of information relevant to safety." Robertson, *supra*, 43 U.S.L.W. at 4837.

To argue that § 2055(b)(1) becomes irrelevant during the pendency of a FOIA demand is to ignore a clear Congressional concern both for the accuracy of the information disseminated and for the damage that an identified manufacturer might suffer. Congress was aware that FOIA requests for information gathered by the Commission would be forthcoming[76] but, nevertheless, imposed affirmative obligations on the Commission which cannot flippantly be avoided.

First, the Commission is charged with the duty of taking "reasonable steps to assure," before disclosure, the accuracy of information from which the identity of the manufacturer can be readily ascertained.[77] It must be emphasized that the Commission is not a guarantor of the accuracy of the information which it releases;[78] to require the Commission to prove that its materials are

[75] Indeed, the problem of "repeal by implication" facing the Supreme Court in Robertson, 43 U.S.L.W. at 4837, is not present here because the FOIA (1966) was enacted before the Act (1972). The 1974 FOIA amendments, P.L. No. 93-502, did not alter the FOIA's impact in these circumstances.

[76] *E.g.*, Hearings on H.R. 8110, H.R. 8157, H.R. 260 (and identical bills) and H.R. 3813 (and identical bills). Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 1st & 2d Sess. 897-98 (1972) (statement of Mr. Nader).

[77] Because the manufacturers are expressly identified, it is not necessary to delineate the contours of the "readily ascertainable" standard of § 2055(b)(1). Each accident report is in a separate file that contains, inter alia, the manufacturer's name. Newman Aff'd, par. 17. The computer printout also identifies the manufacturer whose product allegedly generated that line item. Cull Memorandum, p. 2.

[78] However, H.R. Rep. No. 1153, 92d Cong., 2d Sess. 32 (1972) states that "the Commission has a responsibility to assure that the information which it disseminates is truthful and accurate."

accurate would raise an insurmountable barrier to disclosure. Instead, an affirmative obligation to "take reasonable steps to assure" that information which it releases is accurate has been imposed on the Commission.[79] To determine whether the Commission complied with the requirement, the Court must consider both the means selected to gather the data and the procedure employed to process the data.

The Commission strenuously argues that its method fulfilled the statutory mandate of taking reasonable steps for assuring accuracy, but it is difficult to accept this contention on review of the Commission's data-gathering activities.[80] The company that submitted only accurate reports would not have complied with the requirements of the subpoena because production of all reports—verified or unverified—was ordered by the Commission. One is at a loss to understand how demanding submission of

[79] The Report of the House Committee on Interstate and Foreign Commerce suggests the underlying rationale for restricting the Commission's discretion to disclose data that it has collected.

> "If the Commission is to act responsibly and with adequate basis, it must have complete and full access to information relevant to its statutory responsibilities. Accordingly, the committee has built into this bill broad information-gathering powers. It recognizes what in so doing it has recommended giving the Commission the means of gaining access to a great deal of information which would not otherwise be available to the public or to Government. Much of this relates to trade secrets or other sensitive cost and competitive information. Accordingly, the committee has written into section 6 [15 U.S.C. § 2055] of the bill detailed requirements and limitations relating to the Commission's authority to disclose information which it acquires in the conduct of its responsibilities under this act." H.R. Rep. No. 1153, 92d Cong., 2d Sess. 31 (1972).

[80] The Court does *not* suggest in any way that issuing subpoenas duces tecum for all accident data—accurate or inaccurate—was improper. The Commission is the best judge of what is needed for its own internal purposes. In fact, the limitations on disclosure of 15 U.S.C. § 2055 which protect manufacturers enhance the argument for conferring broad subpoena powers on the Commission. If manufacturers do not have to fear the adverse effects of inaccurate Commission releases, they will be less likely to resist efforts to obtain accident data essential for the Commission's safety standard efforts.

inaccurate data constitutes a reasonable step in assuring the accuracy of information which it will eventually disclose.

The Commission, however, argues that since the reports were submitted by the manufacturers, it cannot be held responsible for the accuracy of the reports. This attempt to shift responsibility for assuring accuracy fails because the duty to take reasonable steps for assuring accuracy was placed on the Commission—not the manufacturers. There is no indication that Congress sought to require manufacturers to investigate each accident report received.[81]

Furthermore, the word "information" as used in § 2055(b)(1) embodies a concept of more than just empirical data. It is especially important to be aware of the impression that will be created by release of the data when the primary purpose for disclosure is to enable comparative safety shopping. Ambiguities in the definition of "TV-related accident" caused some manufacturers to submit only reports of fires and electrical shocks while other manufacturers submitted all accident reports. The Commission was made aware of this potential confusion before it issued its subpoenas but, apparently, refused to take any steps to ameliorate the situation. Furthermore, the Commission never sought to remedy the incomplete responses of some manufacturers to the subpoenas[82] even though the Commission had ample powers to compel com-

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[81] Because a manufacturer does not have a duty to investigate accident reports, the Commission's gratuitous offer to allow the manufacturers to challenge the validity of individual accident reports (Aff'd of Sheldon D. Butts, Ass't Secretary of the Commission, par. 2, Docket Item 35, C.A. No. 75-104) does not satisfy the Commission's statutorily imposed duties. The Commission also asserts that it has faithfully satisfied its statutory obligation by merely passing on without error the data submitted by the manufacturers. This argument also ignores the fact that it is the Commission which has the responsibility of striving to make its releases accurate.

[82] Evidently, varying degrees of compliance did not bother the Commission because it believed that it had obtained sufficient data to enable it to begin the process of defining safety standards. (Northedge Dep. p. 260).

pliance. 15 U.S.C. § 2076(c). Clearly defining the data that it sought and seeking full compliance with its subpoenas were but two reasonable steps which the Commission could have taken to assure that the information was accurate.[83]

On the other hand, the procedures followed by the Commission in processing the raw reports were reasonable for assuring accuracy of the information gathered. The careful initial supervision and later random checks were adequate to assure proper transfer of the data obtained to the summary sheets.[84] It appears that standard practices were followed in keypunching and obtaining the computer printout. Finally, while the manufacturers contend that not all duplicates were eliminated,[85] the duplication search also would seem to have been reasonable in the circumstances.

Second, before release of the TV-related accident data can be permitted, disclosure must be "fair in the circumstances." Fairness obviously is a concept that eludes precise definition. Because of the Commission's decision to subpoena unverified reports, the ambiguity of the subpoena, the failure of the Commission to seek compliance

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[83] On the other hand, the uneven quality of record-keeping among the manufacturers was beyond the control of the Commission. While the company which had the best recordkeeping operation would, in effect, be punished for its efforts, no reasonable steps were open to the Commission to correct the source of misleading impressions.

[84] The data processing phase is described in the text accompanying notes 24-35, *supra*.

[85] *E.g.*, Affidavit of John F. Eisenmann, Manager, Consumer Technical Affairs, Aeronutronic Ford Corp., pars. 7, 10. (Docket Item 22, C.A. No. 75-116). Perhaps it is inappropriate to consider these affidavits because, as indicated at notes 64-71 and accompany text *supra*, they are not part of the administrative record. It is, however, unclear when the printouts were first made available to the companies. If the printouts were not released until after the Commission had made its decision, the companies would not have had any opportunity to comment in a timely fashion to the Commission on the official record. In light of the Court's conclusion on the substantive issue raised by the affidavit, it is not necessary to decide whether the allegation is properly before the Court.

by all manufacturers and the differing quality of record-keeping, it is conceded that a comparison of the accident data to determine the relative safety of the various manufacturers' products would be improvident and misleading. However, the only caveat which the Commission proposes to release with the public disclosure relates to one source of error only—the differing qualities of record-keeping. Apparently, nothing will reflect the other sources of possible error.

Basically, the Commission proposes to release information that could unjustifiably damage [86] the manufacturers because the data does not form a reliable foundation for safety comparison—the only contemporaneous reason given by the Commission for the release of the information. Moreover, the public would be misled by the Commission's efforts. Although fairness is difficult to define, it is even more difficult to determine how disclosure of this information would be "fair in the circumstances." [87]

Third, it must be determined whether disclosure is "reasonably related to effectuating the purposes of [the Act]." Only one reason for disclosure was set forth in the contemporaneous Cull Memorandum upon which the Commission relied in deciding to release the information: "The release of the accident data would assist consumers to better evaluate the safety of TVs." [88] One of the pur-

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[86] The potential harm to plaintiffs is discussed at IV (B) *infra*.

[87] The Commission in attempting to reduce this data to an intelligible format has unintentionally aggravated the problem. A clear computer data listing, with its immediate impact, creates an impression of accuracy that far outshines several filing cabinets of jumbled accident reports.

Furthermore, despite the Commission's contentions to the contrary (Memorandum In Support of Defendant's Motion for Summary Judgment and Opposition To Plaintiff's (sic) Motions for Preliminary Injunction, p. 15, Docket Item 35, C.A. No. 75-104), the release of this information by a government agency carries with it an aura of authenticity which cannot be ignored in determining whether the disclosure is "fair."

[88] Cull Memorandum, p. 5.

The administrative record indicates that this was the only contemporaneous explanation for the Commission's decision to disclose.

poses of the Act is "to assist consumers in evaluating the comparative safety of consumer products." 15 U.S.C. § 2051(b)(2). Therefore, if it were possible to use this information to contrast the safety records of the various manufacturers, disclosure would be reasonably related to achieving the goals of the Act. However, it is clear that the materials which the Commission proposes to disclose cannot aid consumers in determining which television manufacturer has the safest product, and therefore would not be "reasonably related to effectuating the purpose of [the Act]."

Accordingly, plaintiffs have convinced the Court that they have a reasonable probability of success in showing that the Commission failed to "take reasonable steps to assure" that the accident information would be accurate, that disclosure would not be "fair in the circumstances" and would not be "reasonably related to effectuate the purpose" of the Act.[89]

B. *Irreparable Harm.*

The plaintiffs aver, by way of verified complaint and affidavit,[90] that release of the data to the public would irreparably injure their goodwill and reputations by

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See notes 52-53 and accompanying text *supra*. The "post-hoc rationalizations" of the Newman Affidavit, while not appropriate for consideration here, are addressed when the preliminary injunction issue of harm to the public is reached." See IV (B) *infra*.

The memorandum also urges disclosure in response to the "overriding health and safety issues involved." The Commission obtained the accident reports by early fall of 1974 but did not decide to release them until the spring of 1975. Thus, the Commission, by its own actions, has indicated that time is not of the essence. A generalized warning of the hazards encountered while watching television would not have required identification of the manufacturers. See note 93 *infra*.

[89] In light of the Court's resolution of the issues raised under 15 U.S.C. § 2055(b)(1), it is not necessary to consider the other contentions urged by the plaintiffs for preliminary injunctive relief.

[90] *E.g.*, Affidavit of Fred R. Wellner, General Manager, Television Receiver Products Dept., General Electric Co., pars. 4-14 (Docket Item 11A, Ex. A-Aff., C.A. No. 75-136).

generating unwarranted adverse publicity. Furthermore, they contend that their competitive positions would be unfavorably affected by public disclosure of sensitive, confidential trade and commercial information.

"Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." 11 Wright & Miller, Federal Practice and Procedure § 2948, p. 431 (1973). The plaintiffs' reputations would suffer substantially from the Commission's release of misleading safety information.[91] This risk is not merely speculative, and furthermore the irreparable nature of injury to commercial reputations has been widely recognized. Coca-Cola Co. v. Gemini Rising, Inc., 346 F.Supp. 1183, 1189-90 (E.D.N.Y. 1972); Cutler-Hammer, Inc. v. Universal Relay Corp., 285 F.Supp. 636, 639 (S.D.N.Y. 1968).

The information which the Commission proposes to release would not normally have been made public by the plaintiffs, and it appears that the data would appropriately be deemed confidential.[92] The planned disclosures would undoubtedly harm the plaintiffs by giving their competitors access to sensitive information.

Furthermore, once the information is disseminated, the Court becomes powerless to protect or to restore the status quo pending a final determination of the merits. A preliminary injunction is especially appropriate where the action sought to be enjoined would "impair the court's ability to grant an effective remedy." 11 Wright & Miller, Federal Practice and Procedure § 2948, p. 434 (1973).

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[91] "When the Government focuses adverse publicity on named parties, the consequences to such parties can be disastrous." Gellhorn, Adverse Publicity by Administrative Agencies, 86 Harv. L. Rev. 1380, 1381 (1973).

[92] Plaintiffs also argued that the data constituted either trade secrets or other protected confidential information. The Court did not reach these issues and uses the word "confidential" here in a more colloquial sense.

Thus, the Court finds that disclosure as proposed by the Commission would irreparably harm the plaintiffs. *See* Sims v. Greene, 161 F.2d 87 (C.A. 3, 1947).

C. *Impact On Other Interested Persons And The Public Interest.*

The Court must also consider the consequences of its decision on both interested persons and the public in general. Delaware River Port Authority v. Transamerican Trailer Transport, Inc., *supra*. First, the Commission would not be significantly affected by issuance of a preliminary injunction preventing release of the accident data. The primary objective—obtaining enough data to be able to promulgate safety standards—has been achieved.

Second, in order for a preliminary injunction prohibiting disclosure to harm the public, disclosure first would have had to have been beneficial to the public. The Commission has urged that publicizing the information would assist the public in comparing the safety of various television models. However, it is clear that the data, subject to many potential sources of inaccuracy, simply cannot provide a rational basis for comparative safety shopping.

The Commission also asserts that disclosure would warn the public of hazards associated with the operation of televisions and would suggest questions to ask when purchasing a television, but these two goals could be achieved without releasing the identity of the manufacturers.

Finally, the Commission suggests that the data might be useful to other parties interested in investigating the safety of television receivers. First, the rather speculative benefit is not very significant when compared to the immediate and direct injury that would fall on the plaintiffs if the data were released to the public. Second, it is appropriate to recognize in deciding whether to grant temporary relief that the public interest in the safety investigation is being protected by an energetic and capable Commission investigation.

In sum, it is difficult to perceive how the public interest would be harmed by enjoining the disclosure of information of dubious accuracy.[93]

Accordingly, the Court finds that it is appropriate to preliminarily enjoin the disclosure to the public of the accident data and the computer printout.

This opinion shall constitute the findings of fact and conclusions of law required by Rule 52, F.R.Civ.P.

An order will be entered in accordance with this opinion.

Wilmington, Delaware
October 23, 1975.

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[93] In their memoranda and at oral argument, the parties devoted little attention to the Yereance Report. See notes 36-37 and accompanying text, *supra*. Nevertheless, it appears that plaintiffs still seek to bar its release to the public. (Docket Item 42, p. 3, C.A. No. 75-104).

The Yereance Report mentions the manufacturers twice. First, in parallel vertical columns the manufacturers and their respective Commission filing numbers are listed. (A-7) No accident information is revealed, and, furthermore, the filing numbers are not used elsewhere in the report. Second, the report describes the layout of the computer printout and indicates that the printout identifies the manufacturers. (B-4) The names of manufacturers who could be listed are set forth, and, of course, the plaintiffs are included. Again, no accident information is discussed in conjunction with mention of the manufacturers. Thus, while the Yereance Report is a sobering study of the physical dangers that one may encounter while watching television, the manufacturers are in no way singled out for special attention. There is nothing in the Yereance Report that relates or links accident data to a particular manufacturer.

Therefore, it appears that public dissemination of the Yereance Report would not harm the manufacturers. The absence of irreparable harm is an appropriate basis for declining to grant preliminary injunctive relief. Commonwealth of Pennsylvania ex rel. Creamer v. United States Department of Agriculture, 469 F.2d 1387, 1388 (C.A. 3, 1972).

Furthermore, public interest considerations militate against enjoining disclosure. The Yereance Report represents a straightforward, easy to read document that can inform the public of television hazards. Balancing the benefits of the disclosure against the minimal adverse consequences that might affect the television manufacturing industry as a whole indicates that enjoining disclosure of the Yereance Report would be improper.

Thus, the Court will not issue a preliminary injunction prohibiting disclosure of the Yereance Report.

[Title Omitted in Printing]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, by their undersigned attorneys, hereby move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the grounds that no genuine issue exists as to any material fact and defendants are entitled to judgment as a matter of law. In support of this motion, the Court is respectfully referred to the Affidavit of Constance B. Newman, former Vice-Chairman of the Consumer Product Safety Commission, dated June 27, 1975, previously filed with the Court (a copy of which is attached hereto as Exhibit A); Affidavit of Sheldon Butts, Assistant Secretary of the Consumer Product Safety Commission dated July 2, 1975, previously filed with the Court (a copy of which is attached hereto as Exhibit B); a certified copy of the Consumer Product Safety Commission's October 6, 1975 Executive Session Minute, attached hereto as Exhibit C; the deposition of Robert Northedge, dated May 29, 1975; the administrative records, all previously filed with the

Court; and to Defendants' memorandum in support of their motion for summary judgment.

Respectfully submitted,

/s/ Barbara Allen Babcock
BARBARA ALLEN BABCOCK
Assistant Attorney General

/s/ James W. Garvin, Jr.
JAMES W. GARVIN, JR.
United States Attorney

/s/ Lynne K. Zusman
LYNNE K. ZUSMAN

/s/ Sandra Wien
SANDRA WIEN

Attorneys, Department of Justice
Civil Division, Room 6343
Washington, D.C. 20530
Tel.: 202-739-2240

Attorneys for Defendants

OF COUNSEL:

THEODORE GARRISH
General Counsel

ED CULL
JEANETTE WILTSE

Attorneys, Consumer Product Safety Commission

[Title Omitted in Printing]

AFFIDAVIT OF CONSTANCE B. NEWMAN

Constance B. Newman, being duly sworn, deposes and says:

1. I am the Vice-Chairman of the Consumer Product Safety Commission, an independent federal regulatory Commission, which has been in existence since May 14, 1973.

2. The principal statute administered by the Commission is the Consumer Product Safety Act of 1972 (CPSA), 15 U.S.C. section 2051 *et seq.* This statute was enacted by Congress to protect the public against unreasonable risks of injury associated with consumer products.

3. Shortly after its establishment, the Commission began investigating the hazards associated with television receivers. The Commission had become aware of the occurrence of numerous TV-related accidents from (a) the work of the Commission's predecessor, the National Commission on Product Safety, more fully discussed, *infra;* (b) product defect reports filed with the Commission by television manufacturers; (c) a field survey conducted by the Commission to sample the number of TV-related fires; (d) data obtained from hospital emergency rooms through the National Electronic Injury Surveillance System (NEISS); and (e) TV-related accident reports compiled by the Commission through various means such as consumer injury reports and news articles.

4. On March 22, 1974, the Commission published in 39 Fed.Reg. 10929 (March 22, 1974) a notice of a public hearing on the hazards associated with television receivers and of the need to proceed with the development of a safety standard for televisions. In this notice, manufacturers of TV sets and components were requested to submit TV-related accident data and five categories of technical information. The request for TV-related accident data was as follows:

"In particular each TV manufacturer is requested to submit all accident reports collected since the 1969 hearings held by the National Commission on Product Safety. If present data recording procedures differ from the method proposed in the 1969 'Electronics Industry Association Ad Hoc Engineering Report on Television Fires,' which was submitted to the National Commission on Product Safety, place [sic] indicate the procedures used."

5. Only a few manufacturers submitted the data requested. Instead, the Electronics Industry Association (EIA), on behalf of the television manufacturers, submitted a six-page summary of accident data, which contained statistics allegedly showing the number of fire and shock accidents per one million television sets manufactured for the years 1970 through 1973. The EIA failed to supply the Commission with any details about the accidents.

6. Because the Commission considered the response by the TV manufacturers to the request for information in the *Federal Register* Notice to be inadequate, the Commission on May 13, 1974, issued a special order pursuant to section 27(b)(1) of the Act, 15 U.S.C. section 2076 (b)(1), to 25 manufacturers of television receivers or components, including all of the plaintiffs, except for R.C.A. This special order asked for virtually the identical information that was requested in the above-described *Federal Register* Notice, *i.e.*, TV-related accident data and five categories of technical information.

7. In response to this special order, accident data and technical information was submitted which was claimed to be confidential by most of the manufacturers making said submissions. The Commission's review of these submissions disclosed that the responses by the companies were not complete in a number of areas.

8. Thus, on July 26, 1974, a subpoena *duces tecum* was issued by the Commission, pursuant to section 27(b)(3) of the Act, 15 U.S.C. section 2076(b)(3), to the plaintiffs and three other TV manufacturers, Sony Corp., Wells-Gardner Electronic Corp., and Sanyo Electric, Inc. This subpoena required the submission of TV-related

accident reports collected by the manufacturers since the 1969 hearings held by the National Commission on Product Safety. It also required the submission of various types of technical information previously requested. The subpoena was sent to only 16 companies because most of the companies not subpoenaed had terminated their manufacture of TV sets or TV components.

9. Although the 16 subpoenas issued were not identical in terms of the technical information requested, each company did receive identical requests for TV-related accident reports. The term 'report' was broadly defined so that the Commission would receive the largest possible data base for TV-related accidents.

10. In response to the subpoenas, approximately 120,000 pieces of paper were submitted by the manufacturers, of which it is estimated that 80% consisted of accident data. Fifteen of the 16 subpoenaed manufacturers, including all of the plaintiffs, made claims of confidentiality for all the accident data submitted and for most of the technical information submitted. The small amount of information not claimed to be confidential was made public.

11. By letters dated June 14, 1974, (attached hereto as Exhibits 1 and 2), Consumers Union and Health Research Group made formal requests under the Freedom of Information Act for the disclosure of all information submitted by the manufacturers pursuant to the special orders. After viewing those portions of the material as to which no claims of confidentiality were made, Health Research Group by letter dated July 11, 1974), (attached hereto as Exhibit 3), reasserted its request. By letters dated July 23, 1974, (attached hereto as Exhibits 4 and 5), the Secretary of the Commission informed the requesters that the Commission would respond to their requests as expeditiously as technical analysis and evaluation of the materials on withholding or disclosure would permit.

12. After the issuance of the subpoenas on July 26, 1974, the above-described Information Act requests were informally considered by the Commission to extend to the subpoenaed material. By letters dated August 2, 1974,

the Secretary of the Commission informed the manufacturers of the pending Information Act requests and asked for information to substantiate the manufacturers' claims of confidentiality. The responses of the manufacturers are included in the administrative records submitted in these cases.

13. On October 16, 1974, and October 21, 1974, Consumers Union and Health Research Group wrote letters to the Commission (attached hereto Exhibits 6 and 7), critizing the failure of the Commission to comply with the Information Act requests and stating that a failure to comply by November 1, 1974, would be considered a denial.

14. In response to these letters, a public meeting was held on November 5, 1974, which was attended by Commission personnel, representatives of Health Research Group and Consumers Union, and a representative from the Electronics Industries Association. The meeting consisted of a discussion of the magnitude of the data collected and the possibility of cataloging the information and placing the accident data on computer punch cards. The minutes of this meeting are attached hereto as Exhibit 8.

15. On February 7, 1975, the Commission awarded a contract (Exhibit P-5 to the deposition of Robert Northedge) to Tracor-Jitco, Inc. to process the accident data and catalogue the technical information. The contractor was required to perform the following four tasks under the terms of the contract:

(a) the abstraction of information from each accident report and the entering of said information on a form (attached hereto as Exhibit 9), entitled TV Accident Data, which form contained 27 categories of information;

(b) the compilation of a list of the titles of the approximately 870 technical and engineering documents submitted and the filing of these documents by assigned numbers;

(c) the identification and marking as confidential of the identity of the victim and of documents covered by the

attorney-client privilege and the attorney work product doctrine; and

(d) the weeding out of duplicate or related accidents.

16. Shortly after Tracor-Jitco began its work, the contract was amended to provide for the processing of an additional number of accident and engineering reports and to add a fifth task for the contractor. The fifth task was to re-edit and correct key-punch and coding errors.

17. As a result of the contractor's and the Commission's efforts to process the data submitted under the special orders and subpoenas, the Commission now has nine file cabinets containing information on 7,620 TV-related accidents, each of which is in a separate file folder under the manufacturer's name, and each of which has been reviewed to identify for confidentiality purposes the accident victim's identity and any documents subject to attorney-client privilege or attorney work product doctrine. In addition, the information abstracted from each accident report has been computerized and is available in print-out form. Finally, there exists a listing of the 870 technical documents submitted.

18. To assist in the processing of the TV-related accident data and to analyze and summarize the data following completion of the data processing, the Commission hired a consultant, Robert A. Yereance. Mr. Yereance has prepared for the benefit of the offeror which has been selected to develop a TV standard, a report entitled, "Analysis of TV Accident Data." This report, which is based upon the accident data submitted to the Commission by the manufacturers, analyzes that data in terms of the number of television sets in use in the United States and the relative incidence of television-related accidents. The report does not identify a particular manufacturer, TV model, or chassis; it contains only industry-wide statistics. The purposes of this report were to answer basic questions concerning TV-related hazards, to provide a picture of the magnitude or relative significance of the hazards that exist in TV sets currently in use, and to point out information which should prove valuable in the development of a standard to reduce hazards.

19. On March 28, 1975, the Commission decided to release the TV-related accident data submitted pursuant to the special orders and the subpoenas, except for the identity of accident victims and any documents subject to the attorney-client privilege or the attorney work product doctrine. The Commission at that time also laid down guidelines for determining the confidentiality of the technical information submitted. This decision was based upon the recommendations advanced to the Commissioners in a memorandum from the Office of the General Counsel, dated March 21, 1975, which appears in each of the administrative records submitted in these cases.

20. The guidelines for determining the confidentiality of the technical information have not yet been applied, since, by letter dated May 7, 1975 (attached hereto as Exhibit 10), the Information Act requests of Consumers Union and Health Research Group were narrowed to cover only the TV-related accident data. Therefore, at the present time, there is no outstanding request for the technical information, and thus, no such information is being released.

21. The basis of the Commission's decision to disclose the TV-related accident data is that such data is not exempt from disclosure under the Freedom of Information Act, and even assuming *arguendo* that it was exempt from disclosure as confidential commercial information, the public health and safety overrides the exemption from disclosure. A vital purpose served by release of the information was to inform the public that hazards may exist in operating television receivers.

22. The accident information which the Commission seeks to disclose is comparable to that disclosed by the Commission's predecessor, the National Commission on Product Safety, in 1970. The National Commission was created by Pub. L. No. 90-146 and was charged with conducting "a comprehensive study and investigation of the scope and adequacy of measures now employed to protect consumers against unreasonable risk of injury which may be caused by dangerous household products." Pub. L. No. 90-146, Sec. 2(a).

23. As part of its investigation into dangerous household products, the National Commission, by letter dated August 18, 1969, requested a number of television manufacturers, including all of the plaintiffs except Sharp Electronics, to furnish the National Commission with a listing of all incidents reported to them that relate to the alleged hazard of fire and smoke damage associated with television sets.

24. By letter dated January 9, 1970, the National Commission informed the manufacturers who had submitted accident data that said data was being released in the form of a report which specifically identified 122 television models by manufacturer's name that had a higher than average accident rate for fires. The report also contained a chart which ranked the manufacturers by the number of fire incidents per million sets sold by that manufacturer. A copy of the news release which accompanied this report on accident data is attached hereto as Exhibit 11.

25. Prior to the disclosure of the report and the accompanying news release, ten television manufacturers and the Electronics Industries Association objected to the release of the report on the following grounds:

(a) the data in the report were inaccurate and misleading because some companies maintained better records than other companies;

(b) some companies interpreted TV-related fire incidents more broadly than others and thus submitted more information; and

(c) the data were unsubstantiated and unverified.

26. As previously stated, notwithstanding these objections, the report was released and the Commission is unaware of any harm that accrued to any of the manufacturers as a result of that release.

27. In regard to the current accident data that the Commission would release but for the outstanding temporary restraining orders, the TV manufacturers have been afforded the opportunity to submit for review any errors or discrepancies that may have occurred on the computer print-out. For example, Sony Corp., whose

accident data was released, informed the Commission by letter dated April 22, 1975, that a lawsuit involving one of its reported accidents had been dismissed. This letter was released along with Sony's accident information. In addition, by letter dated May 9, 1975, Counsel for General Electric Corp. informed the Commission of possible errors and duplicates in the computer print-out of the G.E. accident data. By letter dated May 22, 1975 (attached hereto as Exhibit 12), the Commission informed Counsel for G.E. that he would be afforded the opportunity to review G.E.'s accident data in the possession of the Commission to determine if any errors did exist on the print-out and to inform the Commission if any errors did, in fact, exist on the print-out. This letter was sent to the other plaintiffs in order to afford them the same opportunity, in regard to their own data.

28. Additionally, the following disclaimer by the Secretary of the Commission was attached to the accident data of Sony Corp., Wells-Gardner Electronic Corp., and Sanyo Electric, Inc. which are not under temporary restraining orders and which have been released:

> "The television accident statistics being released to you may be misleading because some television manufacturers were more conscientious than others in maintaining television accident files."

29. In sum, the Commission decided to release the accident information in an effort to comply with the intent of the Freedom of Information Act and to further the public interest. The Commission believed that it had taken reasonable steps to insure that the information proposed to be released was accurate and that its disclosure would not be misleading. The Commission believed that disclosure of the information would serve the important purpose of informing the public that hazards may exist in operating television receivers. Furthermore, the Commission felt that disclosure of the information would provide consumers with an indication of the kinds of questions that they should consider when purchasing a television set. Finally, the Commission

hoped that the large data base of TV-related accidents that it had compiled would be useful to other parties interested in investigating the potential hazards associated with television receivers.

/s/ Constance B. Newman
CONSTANCE B. NEWMAN

Subscribed and sworn to before me this 27th day of June 1975.

/s/ Illegible
Notary Public
My commission expires March 31, 1979

EXHIBIT 1

CONSUMERS UNION
A NONPROFIT ORGANIZATION
PUBLISHER OF CONSUMER REPORTS
Washington Office: 1714 Massachusetts Avenue,
Washington, D.C. 20005 / 202-705-19

June 14, 1974

Ms. Sadye Dunn, Secretary
Consumer Product Safety
Commission
Washington, D.C. 20207

Dear Ms. Dunn:

This is a request for information under the Freedom of Information Act, 5 U.S.C. § 552.

Consumers Union wishes to inspect and/or to copy the information submitted by television manufacturers in response to the Commission's Special Order dated May 13, 1974. The requested documents include TV-related accident data; current future-planned, and suggested TV-related safety standards: quality control and quality assurance plans; service technician information; improvement plans for presently used TV sets; information on specific technical areas; information on company standards which exceed UL standards; and tests to assure compliance with higher standards; all as delineated in the Commission's Special Order.

Please notify us of the time and place for our inspection of the materials.

Very truly yours,

/s/ Marsha N. Cohen
MARSHA N. COHEN
Attorney, Washington
Office

cc: Michael Brown, Esq.
Chairman Richard O. Simpson
Commissioner Barbara Franklin
Commissioner Lawrence Kushner
Commissioner Constance Newman
Commissioner R. David Pittle

EXHIBIT 2

HEALTH RESEARCH GROUP
2000 P Street, N.W.
Washington, D.C. 20036

672-0320

June 14, 1974

Secretary
Consumer Product Safety Commission
Washington, D.C. 20207

Dear Ms. Dunn:

On May 13, 1974 the Consumer Product Safety Commission issued Special Orders under Section 27(b)(1) of the Consumer Product Safety Act which were addressed to the manufacturers of television sets. The Special Orders called for information relative to six different categories which could aid the Commission in attempt to determine the seriousness of television related accidents and an appropriate response:

1) Television related accidents data collected since the 1969 hearings held by the National Commission on Product Safety, with an explanation of the methodology used in assembling the data

2) Standards currently used by the manufacturer, those planned for use in the near future (including effective dates) and those suggested for future use. In particular, the manufacturers were ordered to report on the implementation status of each safety standard improvement recommendation set forth in the 1969 "Electronics Industry Association Ad Hoc Engineering Report on Television Fires".

3) Quality control and quality assurance plans, including those in current use, planned for future use and suggested for future use.

4) Data on present and planned qualification requirements for television service technicians.

5) Improvement plans for presently used television sets.

6) Information on the following design techniques:

   (a) techniques for protection against overheating; (b) direct AC to DC chassis design; (c) use of compact portable television sets and sets with thermoplastic enclosures; and (d) minimizing dielectric shock on chassis components.

As is our right under 5 U.S.C. 552, the Health Research Group wished to obtain full copies of the responses of all manufacturers to the Special Orders. In the alternative, we would want to be notified of times at which we may view the documents, take notes and make copies.

If the Commission chooses to withhold any portion of any such response, we request a statement from the Commission of the general nature of the material withheld and the grounds on which the Commission deemed such a deletion to be lawful.

While it is, of course, difficult to make definitive statements concerning material which we have not yet had a chance to examine the Health Research Group wishes to express its strongly held view that information relating to the hazard potential of a product and data on product-related injuries does not and can not fall within any of the exemptions to the Freedom of Information Act. . . . While such information may be embarrassing and, potentially, expensive to a manufacturer, there is no warrant for finding it to be a "trade secret, commercial or financial information and confidential or privileged" within the meaning of the fourth exemption to the Act, 5 U.S.C. 552(b)(4). Similarly, adherence or failure to adhere to a given voluntary standard (and the quality control procedures used to verify adherence) also fall outside the fourth exemption.

Requests #5 and #6 in the Special Orders call for replies which may include information about processes and manufacturing methods. In assessing whether any such information should be excluded from disclosure, we think that the Commission should keep in mind the following two standards laid down by the courts:

> "Trade secrets" within former section 1335 of Title 19 ordinarily meant an unpatented secret; commercially valuable plan, appliance, process or formula. *U.S. ex rel. Norwegian Nitrogen Products Co.* v. *U.S. Tariff Commission, 6 F.2d. 491, 55 App. D.C. 366 (1925)*
>
> [D]ata available to any persons with resources and facilities to perform tests and [which] did not contain trade secrets or other information prohibited from disclosure by this section [18 U.S.C. 1905] . . . would not be exempted from disclosure under section 552 of Title 5. *Consumer Union of U.S. Inc.* v. *Veterans Administration, 301 F. Supp. 796 (D.C.-N.Y. 1969)*.

We understand these cases to say that for information to be exempt from disclosure under the fourth exemption of the Freedom of Information Act and under 18 U.S.C. 1905, it must truly be secret and valuable, not merely unknown to the person petitioning for disclosure, but to others in the same line of business who, if they the information, would provide greater competition to the parties seeking to keep the information hidden. Thus processes and procedures well-known within the industry, though not to outsiders, would not be exempt.

We urge the Commission to give attention to this matter and reply promptly.

Sincerely,

/s/ David Charles Masselli
DAVID CHARLES MASSELLI
Staff Attorney
Health Research Group

EXHIBIT 3

HEALTH RESEARCH GROUP
2000 P Street, N.W.
Washington, D.C. 20036

872-0320

July 11, 1974

Sadye Dunn
Secretary
Consumer Product Safety Commission
1750 K Street, N.W.
Washington, D.C. 20207

Dear Ms. Dunn:

Having been afforded an opportunity to view those portions of the submissions by television manufacturers to Special Orders issued by the Commission, the Health Research Group wishes to inform you that this material does not constitute a complete response to our request of June 14, 1974 for access to this material as is our right under the Freedom of Information Act, 5 U.S.C. 552.

Without precluding or limiting our previous demand for all materials contained in those submissions, we wish to call to your attention the claims by Admiral, General Electric, GTE Sylvania, Matsushita, Motorola, RCA, Sears, Teledyne, Packard Bell, Tobishita, Warwick, Wells-Gardner, and Zenith that their answers to Inquiry #1 in the Special Orders were privileged.

We hope that you will act quickly to require these manufacturers to clarify their claims and make a ruling on them. In the absence of any procedures for Freedom of Information requests in the Commission, we request the right to review and reply to any and all briefs justifying claims of exemption prior to a final ruling by the Commission.

We would appreciate your forwarding this letter to any manufacturers or other recipients of Special Orders

to place them on notice of our continuing intention to gain access to all materials required by the Special Orders.

Sincerely,

/s/ David Charles Masselli
DAVID CHARLES MASSELLI
Staff Attorney

cc: Richard O. Simpson, Chairman
Lawrence M. Kushner, Vice Chairman
Barbara Hackman Franklin
Constance E. Newman
R. David Pittle
Michael Brown, Esq., General Counsel
Edward Cullen, Esq., Office of the General Counsel
Stephen Lemberg, Esq., Office of the General Counsel
Donald Johnson, Assistant Secretary

EXHIBIT 4

CONSUMER PRODUCT SAFETY COMMISSION
Washington, D.C. 20207

Jul. 23, 1974

Marsha N. Cohen, Esquire
Consumers Union
1714 Massachusetts Avenue
Washington, D.C. 20036

Dear Ms. Cohen:

This is in response to your letter of June 14, 1974 requesting that the Commission disclose the information submitted by television manufacturers in response to the May 13, 1974 Order of the Commission.

The Commission recognizes its obligation under the Freedom of Information Act, 5 U.S.C. 552, to disclose all records that are not exempt from disclosure. Therefore, as you know, the Office of the Secretary now has available for inspection and copying by the public all the information received from TV manufacturers for which no claims of confidentiality have been asserted. The Freedom of Information Act also provides that trade secrets and certain commercial or financial information may be exempt from public disclosure. Accordingly, certain categories of information submitted by the TV manufacturers were accompanied by assertions of confidentiality.

We enclose copies of the Commission Order of May 13, 1974 which lists the categories of information requested by the Commission as well as a covering letter which describes the procedure for handling information claimed to be confidential. The letter states that such materials would not initially be made available to the public and that the TV manufacturers would be informed if requests for disclosure are received. Therefore, the TV manufacturers who claimed confidentiality will be informed of your request for disclosure in order to substantiate their claims for confidentiality.

The Commission intends to respond to your request for the TV data as expeditiously as technical analysis and evaluation of the materials for withholding or disclosure will permit. Upon completion of our review, we will make available a description of the information for which confidentiality is claimed, and a list of those portions of the information which were found to be confidential. At that time, those concerned will have an opportunity to determine whether they desire to appeal this initial determination.

Sincerely,

/s/ Sadye E. Dunn
SADYE E. DUNN
Secretary

Enclosures

EXHIBIT 5

CONSUMER PRODUCT SAFETY COMMISSION
Washington, D.C. 20207

Jul. 23, 1974

David Charles Masselli, Esquire
Health Research Group
2000 P Street, N. W.
Washington, D. C. 20036

Dear Mr. Masselli:

This is in response to your letter of June 14, 1974 requesting that the Commission disclose the information submitted by television manufacturers in response to the May 13, 1974 Order of the Commission.

The Commission recognizes its obligation under the Freedom of Information Act, 5 U.S.C. 552, to disclose all records that are not exempt from disclosure. Therefore, as you know, the Office of the Secretary now has available for inspection and copying by the public all the information received from TV manufacturers for which no claims of confidentiality have been asserted. The Freedom of Information Act also provides that trade secrets and certain commercial or financial information may be exempt from public disclosure. Accordingly, certain categories of information submitted by the TV manufacturers were accompanied by assertions of confidentiality.

We enclose copies of the Commission Order of May 13, 1974 which lists the categories of information requested by the Commission as well as a covering letter which describes the procedure for handling information claimed to be confidential. The letter states that such materials would not initially be made available to the public and that the TV manufacturers would be informed if requests for disclosure are received. Therefore, the TV manufacturers who claim confidentiality will be informed of your request for disclosure in order to substantiate their claims for confidentiality.

The Commission intends to respond to your request for the TV data as expeditiously as technical analysis and evaluation of the materials for withholding or disclosure will permit. Upon completion of our review, we will make available a description of the information for which confidentiality is claimed, and a list of those portions of the information which were found to be confidential. At that time, those concerned will have an opportunity to determine whether they desire to appeal this initial determination.

Sincerely,

/s/ Sadye E. Dunn
SADYE E. DUNN
Secretary

Enclosures

EXHIBIT 6

CONSUMERS UNION
A NONPROFIT ORGANIZATION
PUBLISHER OF CONSUMER REPORTS
Washington Office: 1714 Massachusetts Avenue,
Washington, D.C. 20036 / 202-785-1906

October 16, 1974

Ms. Sadye Dunn
Secretary
Consumer Product Safety Commission
Washington, D.C. 20207

Dear Ms. Dunn:

On August 2, 1974, I was notified by Mr. Johnson of your office that the Commission was giving the television manufacturers an opportunity to substantiate their claims that certain information which we have requested under the Freedom of Information Act is confidential and not subject to disclosure.

The manufacturers were given until August 30 to submit their substantiation. Although six weeks have passed since then, we have received no indication as to when the Commission would respond to our initial request for this data. As you are aware, the proposed commission regulations under the Freedom of Information Act indicate that requests for records shall be responded to within ten working days of their receipt. It has been months since our initial request. Please immediately take the appropriate measures to respond to our initial request for information under the Act. We would be obliged to treat any further delay as a denial of our request.

I would appreciate your immediate attention to this matter.

Very truly yours,

/s/ Marsha N. Cohen
MARSHA N. COHEN
Attorney
Washington Office

cc: Comm. Barbara Franklin
Comm. Lawrence Kushner
Comm. Constance Newman
Comm. David Pittle
Comm. Richard Simpson
Michael Brown, Esq.

EXHIBIT 7

PUBLIC
CITIZEN

October 21, 1974

Ms. Sayde Dunn
Secretary
Consumer Product Safety Commission
Washington, D.C.
20207

Dear Ms. Dunn:

By letter of June 14, 1974, the Health Research Group requested the opportunity to view submissions made by manufacturers of television sets to the Special Orders issued by the Commission on May 13, 1974.

An opportunity was afforded us to view some materials not claimed confidential and on July 11, 1974 we wrote the Commission to express our contention that our initial request had not been satisfied and to renew our Freedom of Information request.

You responded on July 23, 1974 to indicate that our original request would be responded to "as expeditiously as technical analysis and evaluation of the materials for withholding or disclosure will permit.".

A letter from the Assistant Secretary, Mr. Donald Johnson, was sent on August 2, 1974 and contained an enclosure which was a copy of a letter sent to manufacturers informing them of the two requests by the Health Research Group and that of Consumers Union and giving them until August 30, 1974 to substantiate claims of confidentiality for materials submitted in response to the Special Order of May 13, 1974 or Commission subpoenas issued on July 26, 1974.

Seven weeks have passed since the August 30, 1974 deadline and the Commission has given no indication of its decisions with respect to the material submitted. Nor have we been afforded an opportunity to view materials submitted in response to the July 26, 1974 subpoenas for which no claims of confidentiality were made, if any

such materials exist. In addition, we have been given no list of materials submitted in response to the July 26, 1974 subpoenas for which claims of confidentiality do exist, identifying the maker of the claim, the general nature of the material for which confidentiality is claimed and the reasons for making the claim.

I believe that it is imperative that materials for which no claims of confidentiality have been made become available for viewing immediately. Further, I can see no reason why the identities of those submitting data in response to the subpoenas who did claim confidentiality not be made public, along with a general description of the areas for which confidentiality was claimed and a statement of reasons advanced in support of confidentiality.

The Health Research Group is well aware of the complexity and sheer volume of the matter under discussion and sympathetic to the demands it must place on the resources of your staff. Therefore, we have not previously written to complain of the length of time the process is taking.

The present situation leaves us no choice but to indicate, as is required by 16 CFR 1015.5, that we will consider a failure to respond in full to our requests of June 14, 1974 and July 11, 1974 on or before November 1, 1974 to be a denial of those requests.

Sincerely,

/s/ David Charles Masselli
DAVID CHARLES MASSELLI
Staff Attorney

EXHIBIT 8

Subject of Meeting:

Health Research Group and Consumers Union Freedom of Information requests for TV data submitted in response to CPSC subpoenas.

Date and Place of Meeting:

Morning of 11/5/74, Office of the Secretary, USCPSC, 1750 K Street, N. W., Washington, D. C.

Commission Participants:

Ms. Sadye Dunn, OS
Mr. James Heffron, OS
Ms. Bea Pitkin, OGC
Mr. Edward Cull, OGC
Mr. Richard Allen, OGC
Mr. Vincent Rocque, Office of Commissioner Franklin
Mr. Robert Northedge, BES
Mr. Robert Yerrance, Consultant

Non-Commission Participants:

Mr. David Masselli, Health Research Group
Ms. Marcia Cohen, Consumers' Union
Mr. Edward Sauer, Representative of Electronic Industries Association.

The meeting was called by CPSC staff in order to review the status of the Freedom of Information requests for TV data filed by the Health Research Group and Consumers' Union. Mr. Edward Cull opened the meeting with a general statement as to the volume of information and the difficulties in reviewing such a large amount of data. He estimated that the submissions from all manufacturers totalled 45 cubic feet or 120,000 pages; approximately 50,000 pages of this material represents duplicates that are not readily identifiable. Mr. Cull further estimated that the data submitted contained 60,000 pages of accident reports. He stated that the

material is being reviewed and categorized with an eye to the following:

(1) the pending Freedom of Information requests;

(2) utilization of the data by the Commission;

(3) the legal evaluation as to whether the submission complied with the subpoenas.

Messrs. Cohen and Masselli then raised questions pertaining to the nature of any claims of confidentiality made by the manufacturers with regard to the data submitted. They expressed concern about the Commission honoring blanket claims of confidentiality and suggested that there is a legal basis for dismissing claims that are not specific.

Mr. Masselli cited a possible inconsistency on the part of the Commission in routinely releasing 15b reports and withholding the accident reports at hand in order to scrutinize their accompanying claims of confidentiality. Ms. Dunn observed that 15b reports are reviewed insofar as any claims of confidentiality are concerned; she added that 15b reports constitute a different category of information from that information with which this meeting is concerned; e.g. subpoenaed raw files.

Ms. Cohen suggests that the Commission choose one company "representative" of the manufacturers, review all the accident data submitted by the company, and make one decision that could be applied to the release of all accident data collected. Mr. Yerrance, consultant to the Commission, remarked that the accident data submitted by one manufacturer is not comparable to that of other manufacturers; the decision to release or withhold accident data would have to be made on a case by case basis.

Mr. Masselli suggested that the Commission consider for the future requiring that submissions made in response to a subpoena be uniform in character. He proposed that the Commission require the subpoenaed parties to index and summarize their submissions. Mr. Cull observed that a legal evaluation would have to be made as to how far a subpoena could go in specifying the degree of uniformity required of a submission. Mr. Yerrance

remarked that from a technical perspective, he was reluctant to try to impose any limit on a submission. He pointed out that some data may be lost if a manufacturer is required to index and categorize its submission. Ms. Cohen recommended that the Commission may want to consider Mr. Masselli's proposition in light of its Freedom of Information guidelines, which require the Commission to provide a response within a short period of time.

Messrs. Cohen and Masselli observed that their Freedom of Information requests of June, 1974, which referred to the data the Commission had been provided by TV manufacturers in response to its Special Orders, were as yet not fully answered. Therefore, they further commented that they had allowed their requests of June to go unattended with the knowledge that they would have access to more and better information once the TV manufacturers had responded to the Commission's subpoenas. Mr. Cull and Ms. Dunn acknowledged that they had been working on the assumption that the more comprehensive response was consistent with the requesters' intent.

The issue of how much time the Commission will need to respond to the pending Freedom of Information requests was raised. Mr. Cull said that the information for which no claims of confidentiality had been made could be assembled immediately, he added that this class of data was considered to be available upon request. Mr. Cull then distributed a set of charts categorizing the submissions insofar as any claims of confidentiality are concerned; the charts indicate a small amount of information not claimed to be confidential. Mr. Cull projected that the legal review of the TV data that is presently under way would be completed by the end of the year (or the beginning of 1975). He further conjectured that implementation of the legal decision as to what claims would be honored and what information would be released would come several months after the legal review had been completed. Mr. Cull noted that additional staff is being sought in order to catalog and prepare the data for release and possible transfer onto punch cards, which

could be made available to the requesters. He added that this idea had not been fully explored and that Messrs. Cohen and Masselli could expect a final decision on the form in which information could be supplied in the months ahead. The question as to whether Health Research Group and Consumers' Union would have access to Consumer Product Safety Commission computer facilities was raised for future consideration.

Messrs. Cohen and Masselli suggested that the Commission clarify, in its proposed Freedom of Information regulations, which party (submitter, requester, or Commission) shall bear the costs of reviewing data in regard to claims of confidentiality. Ms. Cohen and Mr. Masselli also proposed that the Commission make additions to its Freedom of Information regulations to the effect that the submitter of information has appeal recourse to the Commission itself as well as the courts in instances of disputed claims of confidentiality.

All parties agreed that the TV manufacturers' statements or briefs in support of claims of confidentiality shall be released to the requesters as soon as possible. Mr. Cull mentioned the possibility of going directly to the Commissioners for an immediate decision of the claims. Mr. Masselli suggested that, instead of going straight to the Commissioners for a ruling on the claims of confidentiality, the Secretary of the Commission make the initial decision as contemplated in the Freedom of Information regulations. He argued that an appeal within the Commission itself as to the integrity of any of the claims of confidentiality preserved the opportunity to refine the issues and possibly avoid a timely court proceeding.

Mr. Yerrance proceeded to describe the manner in which the accident data would be reviewed. As proposed, any and all useful data would be put on computer punch cards; he remarked that, in addition to being the most economical method for storing the information, the punch cards would allow the data to be sorted and made available in a variety of meaningful categories. Mr. Yerrance remarked that punch cards are flexible and data could

be transferred to magnetic tape if desired by the requester.

Mr. Masselli suggested that the Commission use the raw sales data of each TV manufacturer to compile an industry-wide picture of sales. Mr. Cull remarked that this would be possible provided that individual manufacturers' sales data was not identified.

In closing, Mr. Cull stated that the standards and design material would be releasable when the relevant legal decision had been made (by January). He projected that the accident data would be released some time near the middle of March. He noted that this timetable assumed adoption of the plan to add two technical experts and four clerical workers to the present staff committed to working on the TV data. Mr. Cull emphasized that the notion of punch cards, while proposed, has not received official approval.

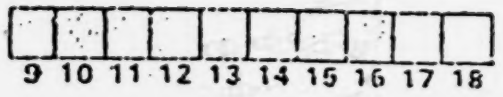
Prepared by James Heffron

TV ACCIDENT DATA

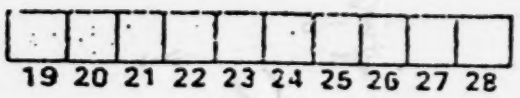
FILE NUMBER

MANUFACTURER

MODEL NUMBER



CHASSIS NUMBER



TV COLOR

B - black & white
C - color
U - unknown

CHASSIS TYPE

H - hot chassis
I - isolated
U - unknown

SWITCH TYPE

I - instant on
N - not instant on
U - unknown

MODEL TYPE

P - portable
T - table
C - console
O - other
U - unknown

CABINET MATERIAL

P - plastic
M - metal
W - wood
A - plastic & metal
B - plastic & wood
C - metal & wood
D - plastic, metal & wood
U - unknown

YEAR OF MANUFACTURE

OWNER'S INITIALS

FAILED PART

39 40

PT - power transformer
HT - horizontal transformer
VM - voltage multiplier
RT - rectifier
CP - capacitor
OF - on-off switch
LC - line cord
AT - antenna
OT - other
UU - unknown

LOCATION IN SET

41 42

HV - high voltage
YA - yoke area
BP - B+ (filter circuit)
VC - video circuit
AC - audio circuit
TN - tuner
OT - other
UU - unknown

PRIOR INDICATION OF TROUBLE

43

Y - yes
N - no
U - unknown

REPAIRED PRIOR TO ACCIDENT

44

Y - yes
N - no
U - unknown

ELECTRIC POWER STATUS

45 46

ON - on
OF - off
UP - unplugged
UU - unknown

TIME IN ELECTRIC POWER STATUS

a) NUMBER OF UNITS

47 48

b) TIME SCALE

49

M - minutes
H - hours
D - days
W - weeks
O - months
U - unknown

TYPE OF ACCIDENT

50

F - fire
S - shock
I - implosion
O - other
U - unknown
B - fire + implosion

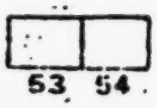
TIME OF DAY (nearest hour)

51 52

24 hour day

STATE

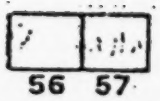
Valid State Code



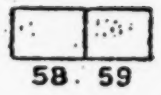
LOCATION

B - basement
F - first floor
S - second floor
A - above second floor
T - outside
O - other
U - unknown

NUMBER OF INJURIES



NUMBER OF FATALITIES

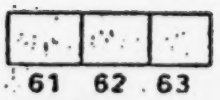


DAMAGE

T - tv only
O - tv and other damage
N - none
U - unknown

CLAIM 1

a) NUMBER OF UNITS



b) AMOUNT SCALE

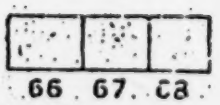
D - dollars
H - hundreds of dollars
K - thousands of dollars
M - millions of dollars

c) TYPE OF CLAIM

M - medical
C - combination
U - unknown

CLAIM 2

a) NUMBER OF UNITS



b) AMOUNT SCALE

D - dollars
H - hundreds of dollars
K - thousands of dollars
M - millions of dollars

c) TYPE OF CLAIM

P - property
U - unknown

DATE OF ACCIDENT (mmddyy)

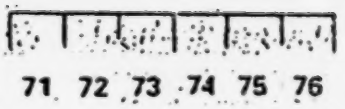


EXHIBIT 10

CONSUMERS UNION
A NONPROFIT ORGANIZATION
PUBLISHER OF CONSUMER REPORTS
Washington Office: 1714 Massachusetts Avenue,
Washington, D.C. 20036 / 202-785-1906

May 7, 1975

Ms. Maryanne Kane
Consumer Product Safety Commission
1750 K Street, N.W.
Washington, D.C. 20207

Dear Ms. Kane:

This letter will confirm the substance of our conversation of May 6, 1975, and responds to your request for clarification of the scope of our request.

On June 14, 1974, Consumers Union and Public Citizen's Health Research Group filed a request with the Commission under the Freedom of Information Act for copies of or access to all documents submitted pursuant to Special Orders dated May 13, 1974. Such documents included both TV-related accident data and certain technical information relating to television construction.

On July 26, 1974, the Commission issued subpoenas compelling 16 TV manufacturers to produce TV-related accident data and certain technical documents. Shortly thereafter, Consumers Union, the Health Research Group, and representatives of the Commission agreed orally that the June 14, 1974 request would be construed by the Commission to apply to the documents submitted in response to both the Special Orders and the subpoenas, as well as to products of the Commission's processing of such documents. That agreement is documented in the Commission's minutes of a November 5, 1974 meeting, at which the status of the FOIA request was discussed.

Consumers Union and Health Research Group subsequently agreed with the Commission staff to narrow their request to include only the TV-related accident data,

not the technical documents. No request by Consumers Union or Public Citizen relating to standards or design of TV's is currently pending before the agency.

Our suit in the District Court of the District of Columbia seeks the release of information requested as described above, with the additional limitations imposed by the Commission and acceptable to us that (1) names of accident victims, and (2) information within the work product doctrine are not public.

Very truly yours,

/s/ Nancy H. Chasen
NANCY H. CHASEN
Attorney, Washington Office

EXHIBIT 11

NAT'L. COMMISSION ON PRODUCT SAFETY
HEARINGS
Washington, D.C.—March 5, 1970

NATIONAL COMMISSION ON PRODUCT SAFETY
NEWS
1016 - 16th Street, N.W., Washington, D.C. 20036

Eleanor Pollock
Ruth K. Holstein
202-382-5534

For Immediate Release
January 27, 1970

COMMISSION RELEASES INFORMATION ON COLOR TV HAZARDS

The National Commission on Product Safety today released the brand names and model numbers of color television receivers which it said exceeded the industry average for fire hazards.

At the same time the Commission, a fact-finding and study panel lacking regulatory powers, wrote involved manufacturers urging them to take steps to rectify potential hazards in any of the listed sets and citing recall, repair or replacement of faulty components as appropriate actions.

The letters to the electronic firms acknowledge that publication of model numbers would burden servicing facilities and that some of the listed models might not have defective components.

"Nevertheless," wrote Chairman Arnold B. Elkind, "we believe it essential that this information be furnished to the public and that appropriate action be taken . . . rather than risk the consequences of fires in color television receivers."

Approximately 22 million color TV sets are in use today. The smoke and fire incident ratio for color versus blacl and white TV is about 40 to 1.

The industry average of 0.120 incidents per thousand color sets was developed from information submitted to the Commission by manufacturers on the number of smoke and fire claims reported to them involving their products.

John I. Thompson and Co., technical engineers, were employed by the Commission to analyze the data. That firm ascertained the industry mean by dividing the number of fire incidents reported by the number of sets sold.

The Tompson Co. then advised the Commission that the following manufacturers, in descending order exceeded the industry average: Lear Siegler (Olympic), Packard Bell, Magnavox, Sylvania, Philco-Ford and RCA.

Other manufacturers also reported incidens, but their aggregate incident rate was below the industry average. These were in descending order: General Electric; Admiral; Motorola; Emerson; Warwick (Sears); and Zenith.

The following is a list of 122 models which have had 3 or more incidents per 10,000 sets sold—more than twice the industry average.

Admiral—Models AK5598; C5311.

Emerson—Model 21T01.

General Electric—Models M902; M900; M961; M901; M960; M280; M912; M258; M946; M920.

Lear Siegler (Olympic)—Models CK5413; CK5374; CK5368; CC3352; CC326; CC5359; CC5355; CC3345; CC3337.

Magnavox—Models U554; U504; T542; T540; T560; T539; U556; U546; U553; T541; T549; T543; T508; T538; T537; T507; T557; T558; T547; T534; T561; T562; T544; T568; U532; T566; T509; U524; T514; T552; U506; U505; T550; T548.

Motorola—Models 23RL325; 23CL328BS; CL803CS; WL851; CU610CW; CU612; 23CL325.

Packard Bell—Models CSW504; CSW402; CSW804; CSW500; CSW501; 25CD2; CSW702; CSW606; CSW602; CSW502.

Philco-Ford—Models Q5528; P6000; P5230; P6404; R5652; R5609; R6520; Q6420; Q5488; R6508.

RCA—Models GG739; HH864; HG685; HL850; HG809, GL736; GF731; GG721; HH844; HL872; JH640; GG607; GF753; GG643; GG661; GG733; GF636; FF555; GG667; GG843.

Warwick (Sears Roebuck—Models 3123; 41912; 4190; 41952.

Sylvania—Models 25LC47; 25LC24PW; 25HC83; 25LC46; 25LC122B; 25HC71; 25LC19; 25LC113; 21LC36; CF481; 25LC114C; 21LC21; 25LC10; 21LC35.

The Commission's suggested recall involves more models of Magnavox than of any other manufacturer, but that company advised the Commission that each of its identified models was made during 1964 and 1965 and that "it has had no reports of comparable problems for later models."

Seventeen manufacturers representing more than 95 percent of the TV industry submitted information to the Commission during its fire hazard survey. The study was undertaken last October following consumer complaints, newspaper reports and Congressional inquiries. Since data submitted by four Japanese manufacturers were not comparable to that of U.S. manufacturers, Japanese brands were not included in the Commission survey. Industry-wide lack of uniform record-keeping prompted the Commission to suggest and the industry to agree to a more uniform system of recording information.

A Commission staff spot-check of major city fire departments which ascertain specific categories of causes of fires revealed varying numbers attributed to TV sets: 361 in New York in 1968; 215 in Chicago in 1969 (including radios); 13 in Houston since October 1967; an estimated 60 in Omaha in 1968; 43 in Denver in 1968; 131 in San Francisco since 1967; 112 in suburban Los

Angeles in 1968. The Commission says that a conservative estimate relates about 10,000 fires each year to TV sets.

At a meeting between the Commission and TV industry representatives October 31, manufacturers agreed to assign top technical experts to a crash program to develop maximum safety standards aimed at preventing fires in color receivers.

Meantime, the Commission had pinpointed such TV component parts as flyback transformers, switches and yokes as possible causes of smoke and fire hazards in color sets.

When the industry presented the Commission with its proposed standards to minimize fire hazards in color sets, the Commission sent the proposals to an independent engineering firm—Tracor, Inc. of Austin, Texas—for evaluation.

Tracor advised the Commission that even further improvements should be made to the proposed upgraded standards, particularly in three fire-prone areas—flyback transformers, capacitors and yokes.

The Commission commended the industry for its efforts and urged that the additional proposals be taken under consideration.

EXHIBIT 12

ECull:apj:5/22/75

cc: —Admiral Corporation
—General Electric Company
—Magnavox Company
—Matsushita Electric Corp. of America
—Motorola, Inc.
—RCA
—Sharp Electronics Corp.
—GTE Sylvania &
Aeronutronic Ford Corp.
—Teledyne Mid-American Corp.
—Toshiba America, Inc.
—Warwick Electronics, Inc.
—Zenith Radio Corp.

William R. Wickers, Esq.
[Illegible]
1730 Penna. Avenue, N.W.
Washington, D.C. 20005

Dear Mr.

Your letter of May 9, 1975, to Mr. Vincent DeLuise was referred to me for reply. In your letter, you requested that the Commission review the TV accident data submitted by your client, General Electric to determine the source of certain line items in the computer printout of General Electric's accident data. You also requested us to check if certain line items were duplicates and if there were some erroneous data included in two line items.

This is to inform you that the Commission will make available to you all the accident data submitted by General Electric so that you personally can determine the accuracy of the line items on the computer printout. The accident data is catalogued and numbered so that it corresponds to the number assigned to the accident on the computer printout.

After you have had an opportunity to check the accuracy of the computer printout of your client's data, you

may submit a list of errors to the Commission. The Commission will review your list of errors and notify you if any corrections are needed. If it is found that an error exists on the computer printout of your client's data, the error will be corrected.

If you would like to review General Electric's accident data, please contact Mr. Bert Simson (496-7606) to make the necessary arrangements.

Sincerely,

EDWARD J. CULL
Attorney
Office of the General Counsel

gc chron
gc files
gc reading (2)
E. Cull, OGG/A

[EXHIBIT B]

[Title Omitted in Printing]

AFFIDAVIT OF SHELDON D. BUTTS

Sheldon Butts, being duly sworn, deposes and says:

1. I am an Assistant Secretary of the Consumer Product Safety Commission. Part of my responsibilities as an Assistant Secretary is to maintain the custody of the official records of the Commission.

2. The Commission has invited the plaintiffs to examine their submissions and their line items on the computer print-out of their accident data. The Commission has stood willing to make any changes either on the print-out or in the accident files themselves, if a plaintiff can substantiate any inaccuracies or duplications or can show that any non-accident data was erroneously included by the plaintiff in its accident records.

3. Some of the plaintiffs, for example, Matsushita Electric Corporation of America (MECA), have contended that the Commission's proposed release will include sales data as well as accident data. A review of MECA's accident records revealed two instances where sales figures were erroneously provided with its accident data. In one of these instances, the sales statistics had been previously marked for nondisclosure and in the other instance, the sales figures when discovered were similarly marked for nondisclosure.

4. Finally, the data submitted by the plaintiffs in response to the requests in the Special Orders and Subpoenas for technical information has been separately catalogued and completely segregated from the accident data. This technical data, which is not part of the pro-

posed release, is presently being stored at the National Bureau of Standards.

/s/ Sheldon D. Butts
SHELDON D. BUTTS

Subscribed and sworn to before me this 2nd day of July, 1975.

/s/ [illegible]
Notary Public
My commission expires March 31, 1979.

EXHIBIT C

[SEAL]

U.S. CONSUMER PRODUCT SAFETY COMMISSION
Washington, D.C. 20207

CERTIFICATE

Pursuant to the provisions of Rule 44 of the Federal Rules of Civil Procedure, I hereby certify that the attached copy of the Consumer Product Safety Commission's October 6, 1975 Executive Session minute, which contains the Commission decision and Commissioners' votes on the application of Section 6(b)(1) of the Consumer Product Safety Act, is a true copy of a document on file with the Consumer Product Safety Commission and is part of the official records of said Commission. In witness whereof, I have, pursuant to the provisions of Title 15, United States Code, Sections 2053(d) and 2076(b)(9), hereto set my hand and caused the seal of the Consumer Product Safety Commission to be affixed this 17th day of August, 1977.

/s/ Richard E. Rapps
RICHARD E. RAPPS
Secretary

[SEAL]

U.S. CONSUMER PRODUCT SAFETY COMMISSION
Washington, D.C. 20207

1750 K Street, N. W.
Washington, D. C.
9:30 am

Presiding: Chairman Simpson

Present : Commissioner Newman
Commissioner Kushner
Commissioner Franklin
Commissioner Pittle

ITEM

Application of Section 6(b)(1) of the Consumer Product Safety Act (15 U.S.C. 2055(b)(1)). (Briefing package, consisting of "Policy Statement on Public Disclosure of Information" transmited by Commissioner Newman on August 18, 1975 and General Counsel's opinion transmitted to Commission on September 19, 1975.)

DECISION

Section 6(b)(1) applies, as a matter of law, only to affirmative Commission disclosures (e.g. press releases, press conferences, publications, speeches,) but not to disclosures made pursuant to Freedom of Information Act requests. As a matter of policy, however, the Commission may attempt to provide Section 6(b)(1) protections with regard to certain disclosure of information generated by Freedom of Information Act requests.

VOTE

Concurring in the above decision:

/s/ R. Simpson
CHAIRMAN SIMPSON

/s/ B. Franklin
COMMISSIONER FRANKLIN

/s/ Larry Kushner
COMMISSIONER KUSHNER

/s/ R. David Pittle
COMMISSIONER PITTLE

Dissenting:

/s/ C. Newman
COMMISSIONER NEWMAN*

Submitted by: Commissioner Franklin

---

* Opinion to follow.

[Title Omitted in Printing]

MOTION OF GTE SYLVANIA AND AERONUTRONIC FORD CORPORATION FOR SUMMARY JUDGMENT

Plaintiffs GTE Sylvania Incorporated and Aeronutronic Ford Corporation* hereby move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the following grounds:

(1) The Consumer Product Safety Commission has announced its intention to publicly disclose certain "TV-related accident data" submitted by plaintiffs GTE Sylvania Incorporated and Aeronutronic Ford Corporation and by other manufacturers of television receivers and components;

(2) Section 6(b)(1) of the Consumer Product Safety Act prohibits public disclosure of information where the Commission fails to take reasonable steps to assure the accuracy of the information, or where disclosure would not be fair in the circumstances, or where disclosure is not reasonably related to effectuating the purposes of the Act;

(3) There is no genuine factual issue as to the following:

(A) That the Commission failed to take reasonable steps to assure the accuracy of the data;

(B) That public disclosure would not be fair in the circumstances;

(C) That public disclosure is not reasonably related to effectuating the purposes of the Act;

(D) That irreparable injury to plaintiffs would result from disclosure of the data; and

(E) That enjoining release of the data would not harm the public.

---

* Now Ford Aerospace & Communications Corporation by change of name effective December 1, 1976.

(4) Since public disclosure of the "TV-related accident data" would contravene Section 6(b)(1), plaintiffs are entitled to a judgment as a matter of law prohibiting public disclosure of the data by the Consumer Product Safety Commission. Thus, judgment may be entered in favor of the plaintiffs without the necessity of deciding other possible grounds barring disclosure as to which disputed factual issues exist.

The factual and legal bases for this motion are set forth more fully in the accompanying memorandum.

Respectfully submitted,

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[Title Omitted in Printing]

MOTION TO ALTER OR AMEND JUDGMENT

Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, defendants move to alter or amend the judgment and Permanent Injunction entered in this action on December 8, 1977. As grounds for this motion, defendants refer the Court to its Order of December 8, 1977, which permanently enjoins release of the data at issue in this litigation while the Court's Opinion of the same date holds that the "Commission still has not complied with Section 6(b)" and implies that release would be appropriate if the agency takes the steps required under section 6(b)(1) of the Consumer Product Safety Act. In support of this motion the Court is respectfully referred to its Opinion of December 8, 1977, and the memorandum in support of defendants' Motion to Alter or Amend Judgment filed herewith.

Respectfully submitted,

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[Title Omitted in Printing]

ORDER DENYING DEFENDANTS' MOTION TO ALTER OR AMEND JUDGMENT

The Court having considered defendants' motion to alter or amend the judgment entered on December 8, 1977, pursuant to Rule 59(c), F.R.Civ.P. (Docket Item 127),[1] and defendants' memorandum in support thereof, it is

ORDERED that defendants' motion to alter or amend the December 8, 1977 judgment is denied.

Reason: When the Court stated in its December 8th opinion that the "Commission still has not complied with Section 6(b)" (slip op. 23), it was simply restating the undisputed fact that the Commission had taken no steps to comply with Section 6(b) during the two-year period after the preliminary injunction issued. (Slip op. 2). This language does not imply that release would be appropriate if the agency should at some indefinite time in the future make accurate the unverified material gathered in 1974. Indeed, the Commission has made no showing that it would ever be able to verify and make accurate the unverified information. Nevertheless, if at some time in the future the Commission is able to demonstrate to the Court its ability and willingness to take reasonable steps to assure the accuracy of the unverified material gathered in 1974 and to satisfy the other requirements of Section 6(b)(1), the Court presumably could then modify the outstanding permanent injunction to permit the release of the information to the public. Until the Commission is able to make such a showing, the proposed amendment to the injunction is not warranted.

Dated: December 22, 1977.

/s/ James L. Latchum
JAMES L. LATCHUM
Chief Judge

---

[1] Docket Items refer to Civil Action No. 75-104.

[Title Omitted in Printing]

NOTICE OF APPEAL

Notice is hereby given that the Consumer Products Safety Commission hereby appeals to the United States Court of Appeals for the Third Circuit from the Judgment and Permanent Injunction entered in this action on the 8th day of December, 1977, and from the Order Denying Defendants' Motion to Alter or Amend Judgment of December 8, 1977, entered in this action on the 22nd day of December, 1977.[1]

MARK N. MUTTERPERL, ESQUIRE
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DATED: *February 9, 1978*

[1] The opinion and judgment of the court of appeals of April 30, 1979, are printed at Pet. App. A (p. 1a) and B (p. 71a). The opinion and judgment of the district court of December 8, 1977, are printed at Pet. App. C (p. 77a).

SUPREME COURT OF THE UNITED STATES

No. 79-521

CONSUMER PRODUCT SAFETY COMMISSION, ET AL., PETITIONERS

v.

GTE SYLVANIA, INC., ET AL.

ORDER ALLOWING CERTIORARI

Filed December 3, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

No. 79-521

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CONSUMER PRODUCT SAFETY COMMISSION, *et al.*,
Petitioners,

v.

GTE SYLVANIA, INCORPORATED, RCA CORPORATION, THE MAGNAVOX COMPANY, ZENITH RADIO CORPORATION, MOTOROLA, INC., WARWICK ELECTRONICS, INC., FORD AEROSPACE & COMMUNICATIONS CORPORATION, MATSUSHITA ELECTRIC CORPORATION OF AMERICA, SHARP ELECTRONICS CORPORATION, TOSHIBA-AMERICA, INC., GENERAL ELECTRIC COMPANY, ADMIRAL CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-521

CONSUMER PRODUCT SAFETY COMMISSION, *et al.*,
Petitioners,

v.

GTE SYLVANIA, INCORPORATED, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, which is reprinted as Appendix A to the petition (hereafter "App. A"), is reported at 598 F.2d 790 (1979). The opinion of the United States District Court for the District of Delaware, which is reprinted as Appendix C to the petition (hereafter "App. C"), is reported at 443 F. Supp. 1152 (1977) and expressly incorporates earlier findings of fact and conclusions of law set forth in that court's earlier decision reported at 404 F. Supp. 352 (1975).

QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed entry of a permanent injunction that precludes the Consumer Product Safety Commission ("CPSC") from disclosing certain "TV-related accident" information furnished to the CPSC in confidence by respondent television manufacturers, where the CPSC failed to take reasonable steps to assure that the information it proposed to disclose was accurate and that disclosure would be fair in the circumstances and reasonably related to effectuating the purposes of the Consumer Product Safety Act, as required by Section 6(b)(1) of the Act, 15 U.S.C. § 2055(b)(1).

STATEMENT

The Gathering of the Information

In 1974, the CPSC began to investigate hazards supposedly associated with television receivers and to consider the necessity of developing safety standards for such receivers. (C.A. App. 450;[1] 39 Fed. Reg. 10,929 (1974).) The public notice by which the investigation was initiated requested television manufacturers to submit to the CPSC all "TV-related accident" data collected by them since hearings held in 1969 by the National Commission on Product Safety. *Id.* at 10,930.[2]

After reviewing the data voluntarily submitted in response to the public notice, the CPSC decided to use compulsory procedures to obtain additional data. On May 13, 1974, a special order was forwarded to twenty-five manufacturers requesting submission of virtually the

[1] "C.A. App." refers to the Joint Appendix to the briefs in the Court of Appeals.

[2] It is noteworthy that five years later, after a thorough review of the safety of television receivers, CPSC found that no standards were necessary and terminated its investigation. 44 Fed. Reg. 44,206 (1979).

same information that had been requested in the public notice. (C.A. App. 451-52, 608-12, 644-48.) On July 26, 1974, subpoenas *duces tecum* were issued to the twelve respondents (and four other manufacturers), ordering them to furnish the CPSC with "TV-related accident reports." (C.A. App. 394-95; *see, e.g., id.* 615-18.)

The manufacturers' submissions in response to the notice, special orders, and subpoenas were accompanied by claims of confidentiality. (C.A. App. 392-93, 397, 452; *see, e.g., id.* 613, 623.) The manufacturers also claimed that any disclosure of the information by the CPSC based on absolute numbers would be grossly misleading. (*See, e.g.*, C.A. App. 588, 631, 788.)

From the very outset of the investigation, the manufacturers' compliance with the CPSC's various requests for information was impeded by the repeated failure of the CPSC to define the term "TV-related accident." (*See, e.g.*, C.A. App. 651-53, 802, 804; App. A 12a.) This problem was exacerbated by the fact that there was and is no generally accepted definition of this term in the television industry. (C.A. App. 395 n.19, 802.) However, despite warnings that the vagueness of its requests would inevitably result in confusion as different manufacturers gave varying meanings to the term "TV-related accident" (C.A. App. 1056), the CPSC made no attempt whatsoever to define this term (C.A. App. 804).

As predicted, the failure of the CPSC to define "TV-related accident" resulted in nonuniform responses to the notice, special orders, and subpoenas because some manufacturers applied a much more restrictive definition to this term than did others. (C.A. App. 403-05, 818.)[3]

[3] The CPSC refused to exclude any of the reports submitted, and, in its analysis of the submissions, regarded as "TV-related accidents" such situations as a fire caused by a burning candle sitting on top of a television set or a hernia sustained while carrying a television set. (C.A. App. 404, 807, 893.)

For example, some manufacturers furnished data only for alleged incidents involving personal injury or damage to property external to the television set, whereas other manufacturers submitted reports on alleged incidents that involved damage to the sets only. (*See, e.g.*, C.A. App. 590, 676, 682.) Similarly, certain manufacturers limited their submissions to data for alleged incidents relating to television sets manufactured subsequent to 1969, whereas other manufacturers furnished reports on alleged incidents that came to their attention within the period in question, without regard to the date of manufacture of the sets alleged to have been involved. (*See, e.g.*, C.A. App. 591, 673, 682.)

Although the CPSC conceded that some manufacturers were "more conscientious than others in maintaining television accident files" (App. A 13a; C.A. App. 102), it made no attempt to compel more uniform compliance with its special orders and subpoenas because in its "technical judgment . . . sufficient information [had] been collectively submitted by the sixteen manufacturers to significantly facilitate [its] regulatory development activities for TV receivers" (C.A. App. 685).

Finally, compounding the unreliability of the submitted information as a whole and the impossibility of drawing meaningful comparisons among manufacturers was the fact that the special orders and subpoenas required the manufacturers to supply all reports of "TV-related accidents" without regard to whether the reports were verified. (C.A. App. 655.) The surprisingly loose standards of reliability and accuracy for the data sought by the CPSC were indicated on the sample data forms accompanying the subpoenas, which explicitly acknowledged that "in many cases" the data would be "incomplete, unverified and even incorrect." (*Id.*; App. A 12a.)

The CPSC took no steps to determine whether any of the alleged "TV-related accidents" referred to in the

reports submitted by the manufacturers were in fact caused by the television sets involved (C.A. App. 1046) or, indeed, whether they had actually occurred (C.A. App. 987-88), except to investigate fewer than 100 (1.3%) of the 7,620 reported incidents (C.A. App. 815).

After reviewing the manufacturers' submissions, the CPSC hired a contractor to computerize the information and to prepare a printout listing each alleged incident reported by a manufacturer and cataloging it by type. (C.A. App. 454, 476.) The printout does not indicate that something other than the television set itself may have been the cause of any of the "TV-related accidents" listed (C.A. App. 898), or that most of the reports from which the printout was compiled are unverified or come from an unreliable source (C.A. App. 876-77, 881, 899, 1020). In short, the printout suffers generally from the same defects as the underlying data. (C.A. App. 403-05, 585, 818, 936.) The CPSC's own consultants and engineers admitted that comparisons among the manufacturers on the basis of the collected "TV-related accident" data would not be proper and would not aid in making safety comparisons or serve any other useful purpose. (C.A. App. 915-18, 1028, 1048-49.)

The CPSC's Determination To Release the Information

On June 14, 1974, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, Consumers Union of the United States, Inc., and Public Citizen's Health Research Group formally requested the CPSC to disclose the information submitted in response to its special orders. (C.A. App. 453; *see id.* 460-63.) The manufacturers were informed of the requests (C.A. App. 453; *see, e.g., id.* 622) and responded by reasserting their claims of confidentiality of their submissions (C.A. App. 628-36, 660-63.)

By letters dated April 7 and 8, 1975, the CPSC notified the manufacturers of its determination, notwithstanding the melange of inaccuracies in the "TV-related accident" information that had been submitted, to release both the underlying information and the computer printout cataloging it. (*See, e.g.*, C.A. App. 637-38.) The letters were accompanied by copies of a memorandum from the Office of General Counsel dated March 21, 1975 (the "Cull Memorandum") (C.A. App. 96-102), which the manufacturers were told "formed the basis" for the CPSC's decision to disclose the material in question. (C.A. App. 456; *see, e.g., id.* 638.) The Cull Memorandum recognized "that some television manufacturers have apparently been more conscientious in compiling accident data than others and thus, the release of the accident data might be misleading in some cases," and recommended that the CPSC offer to accompany the release of the data with a statement reflecting this fact. (C.A. App. 102.) The Cull Memorandum went on to conclude that the data was not exempt from disclosure under the FOIA as confidential commercial information and that even if it were so exempt it should be released "because of the overriding public health and safety issues involved." (C.A. App. 100; *see also id.* 456-57.)

Proceedings in the District Court

Upon being advised in April of 1975 that the CPSC had made a final determination to release the information to the public, the manufacturers brought suit in various federal judicial districts against the CPSC seeking to enjoin disclosure of their submissions on the grounds that release was barred, *inter alia*, by certain exemptions to the FOIA, 5 U.S.C. § 552(b); by Section 6 of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2055; and by the Trade Secrets Act, 18 U.S.C. § 1905. *See GTE Sylvania, Inc.* v. *Consumer Product Safety Commission*, 404 F. Supp. 352, 365 (D. Del. 1975). The

actions were ultimately consolidated before Chief Judge Latchum of the United States District Court for the District of Delaware, where the majority of them had been brought. (C.A. App. 304-09, 312-16.)

Temporary restraining orders prohibiting the disclosure of the information *pendente lite* were entered shortly after commencement of the manufacturers' actions. (C.A. App. 278-303, 310-11.) On October 23, 1975, after extensive briefing and argument, Chief Judge Latchum preliminarily enjoined the CPSC from disclosing the requested information (C.A. App. 384-86) on the ground that the CPSC had failed to comply with Section 6(b)(1) of the CPSA, 15 U.S.C. § 2055(b)(1), in that the CPSC had deliberately subpoenaed unverified and inaccurate information, the disclosure of which would be misleading to the public and unfair to the manufacturers. 404 F. Supp. at 370-73 (*see* App. C 78a).

The District Court held that Section 6(b)(1) imposes three "affirmative obligations" that must be fulfilled before the CPSC may publicly disclose—pursuant to the FOIA or otherwise—information from which the identity of a manufacturer can be readily ascertained and that "[f]ailure to comply with any one of the standards means that disclosure would be improper." 404 F. Supp. at 369. The court found that none of the standards had been met here because (1) the CPSC had not taken reasonable steps to assure that the information submitted by the manufacturers was accurate and because disclosure of the information would be neither (2) fair in the circumstances nor (3) reasonably related to effectuating the purposes of the CPSA. *Id.* at 371-73.

The preliminary injunction remained in effect until December 8, 1977, when, after further briefing and argument, the District Court granted the manufacturers' motions for summary judgment and permanently enjoined

disclosure of the information in question. *GTE Sylvania, Inc.* v. *Consumer Product Safety Commission*, 443 F. Supp. 1152 (D. Del. 1977) (App. C 77a-104a).

Proceedings in the Court of Appeals

On the CPSC's appeal, the United States Court of Appeals for the Third Circuit (Seitz, Chief Judge; Gibbons and Higginbotham, Circuit Judges) unanimously affirmed in its entirety Judge Latchum's permanent injunction. *GTE Sylvania, Inc.* v. *Consumer Product Safety Commission*, 598 F.2d 790 (3d Cir. 1979) (App. A 1a-70a).

In an opinion by Chief Judge Seitz, the court analyzed the language of Section 6(b)(1) in relation to various other sections of the CPSA and conducted an exhaustive review of the legislative history of the CPSA as enacted and subsequently amended. The court held that because the Act gave the CPSC "broad information-gathering authority" not available to the public or to other governmental agencies, Section 6(b)(1) was included to "insure that the Commission's authority to release such information would be limited." (App. A 59a.)

Consequently, the Court of Appeals agreed with Judge Latchum's conclusion that, by proposing to release the misleading, inaccurate, and unverified information it had demanded from the manufacturers, the CPSC had not complied with the requirement of Section 6(b)(1) to take "reasonable steps" to assure the accuracy of information it intends to release. (App. A 69a.) Accordingly, disclosure to the public through the FOIA or otherwise had to give way to the Congressional intent expressed in Section 6(b)(1) to "protect manufacturers from the harmful effects of inaccurate or misleading public disclosure . . . through any means, of material obtained pursuant to [the CPSC's] broad information-gathering powers." (App. A 59a.)

REASONS FOR DENYING THE WRIT

1. The Decision of the Court Below Is Not of the Far-Reaching Significance Urged by the CPSC.

By adopting an unreasonably broad interpretation of the Court of Appeals' opinion regarding Section 6(b)(1), petitioners attempt to create an illusion of an administrative burden in order to convince this Court that the petition for a writ of certiorari should be granted. The opinion does not impose any such burden justifying a grant of certiorari.

The CPSC misinterprets the scope of the court's decision when it asserts that the decision would require the agency to "verify the accuracy of the information it produces pursuant to the FOIA" in order to comply with Section 6(b)(1). (Petition at 12; *see id.* at 11, 13 n.8.) To the contrary, by its own terms Section 6(b)(1) requires only that the CPSC "take reasonable steps to assure" that the information it proposes to disclose is accurate. Verification is totally unnecessary if such steps are taken.

Both courts below made it quite clear that the CPSA does not require the CPSC to guarantee the accuracy of the information contained in documents that it intends to release. In Judge Latchum's words:

> It must be emphasized that the Commission is not a guarantor of the accuracy of the information which it releases; to require the Commission to prove that its materials are accurate would raise an insurmountable barrier to disclosure. Instead, an affirmative obligation to "take reasonable steps to assure" that information which it releases is accurate has been imposed on the Commission.

404 F. Supp. at 370 (footnotes omitted). Here, of course, where the CPSC's own requests for information required

the submission of all reports, unverified and verified, Section 6(b)(1) does prohibit disclosure. Indeed, like the District Court, we are "at a loss to understand how demanding submission of inaccurate data constitutes a reasonable step in assuring the accuracy of information." *Id.* at 371.

Since neither the statute nor the Third Circuit's opinion requires actual verification of the information contained in respondents' documents, petitioners' argument that the CPSC cannot operate under the Third Circuit's interpretation because it would be a "substantial, if not impossible, administrative burden on the agency to verify the accuracy of the information" it proposes to release pursuant to the FOIA (Petition at 12) is wholly unfounded. Moreover, it has not been established that verification would create any such burden. Petitioners state that in 1978 alone the CPSC received approximately 7,800 FOIA requests, some 60 to 70 percent of which related to consumer complaints. (*Id.*)[4] However, petitioners overlook the paucity of FOIA litigation involving the CPSC and the very limited number of objections to disclosure received by the CPSC from third parties in the past. These both demonstrate that any "administrative burden" suggested by petitioners to excuse the CPSC from complying with its statutory mandate is more imagined than real.[5]

---

[4] Respondents have not had an opportunity to test fully the reliability and accuracy of petitioners' extra-record citations. Further, it is a well-established principle that this Court "take[s] a case . . . as it comes to [it] in the record, and receive[s] no new evidence." *Pacific R.R.* v. *Ketchum*, 101 U.S. 289, 296 (1880); *see also Henneford* v. *Northern Pac. Ry.*, 303 U.S. 17, 19 (1938); *Chapman & Dewey Lumber Co.* v. *St. Francis Levee Dist.*, 234 U.S. 667, 668 (1914); *Hussman* v. *Durham*, 165 U.S. 144, 150 (1897).

[5] Indeed, there is no burden whatsoever being imposed at this time because the agency's present regulations state that Section 6(b)(1) applies only to "affirmative dissemination of information" by the CPSC and not to FOIA requests. 16 C.F.R. § 1115.15 (August 7, 1978); *see also* proposed regulations appearing at 42 Fed. Reg. 54,304 (October 5, 1977) (to be codified in 16 C.F.R. § 1013). This, of course, is the statutory interpretation petitioners urged the Court of Appeals to adopt with a notable lack of success.

Despite the claimed volume of FOIA requests received by the CPSC, respondents have been able to discover only four reported cases involving it and the FOIA in the seven years that the agency has been in existence. Two of these comprise the Second and Third Circuit opinions discussed in the petition, and a third arises out of the Third Circuit litigation and is now before this Court on a totally unrelated question. *See GTE Sylvania, Inc.* v. *Consumers Union of the United States, Inc.*, No. 78-1248. These three cases were all filed in 1975.[6] The fourth case, *International Harvester Co.* v. *Consumer Product Safety Commission*, No. 79 C 1185, was filed in the Northern District of Illinois in 1979.[7]

Furthermore, in response to an FOIA request recently made by counsel for one of the respondents, the CPSC has stated that only twelve objections to the release of documents have been received thus far in 1979. The CPSC believes that only five were received in 1978 and three in 1977. Only two of the twelve objections made in 1979 were based on Section 6(b)(1), and it is believed that only two objections made in 1978 and only one in 1977 were based on this statutory provision. These figures reveal that, despite a large number of FOIA requests

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[6] 1979 Annual Report, Consumer Product Safety Commission, Appendix I, p. 111.

[7] Petitioners' concern over possible forum shopping (*see* Petition at 11) is convincingly refuted by the forum selected by International Harvester. The Delaware District Court's interpretation of Section 6(b)(1) has been publicly available since October, 1975. If petitioners were correct, International Harvester, a Delaware corporation, should have filed suit in the District of Delaware because the CPSC had decided to release the documents at issue and the corporation is opposing disclosure based on the CPSC's failure to comply with Section 6(b)(1), among other statutory provisions.

received by the CPSC in the four years since Judge Latchum's opinion was published, only a handful of objections to disclosure have been made and fewer still have been based on Section 6(b)(1). It is particularly telling that objections to disclosure were registered in only five of the 7,800 FOIA requests the CPSC claims to have received in 1978, and in only two cases were the objections based on Section 6(b)(1).

The extra-record references made by the CPSC, which purport to demonstrate the seemingly Herculean task required to comply with Section 6(b)(1), are also misleading by their failure to reflect several statutory and regulatory burdens already imposed on the CPSC before it may release any documents pursuant to an FOIA request. This Court recently held in *Chrysler Corp.* v. *Brown*, —— U.S. ——, 99 S. Ct. 1705 (1979), that the Trade Secrets Act,[8] 18 U.S.C. § 1905, provides a statutory basis for preventing disclosure of certain types of trade secret and confidential information that must be considered by the CPSC. Additionally, the CPSC's own regulations make it clear that the CPSC will withhold information exempt from mandatory disclosure under the FOIA pursuant to 5 U.S.C. § 552(b) whenever the CPSC "determines that disclosure is contrary to the public interest." 16 C.F.R. § 1015.15; *see id.* § 1015.16.[9] Thus,

[8] The CPSA expressly prohibits the agency from releasing the types of information protected by the Trade Secrets Act and does not allow for release even pursuant to quasi-legislative regulations as does the more general statute. *See* 15 U.S.C. § 2055(a)(2); *see also Chrysler Corp.* v. *Brown, supra.*

[9] The Annual Report on the Administration of the Freedom of Information Act, Calendar Year 1978, Consumer Product Safety Commission (March 1, 1979), states that 69 of the 7,800 requests for Commission records were denied in whole or in part. Forty-nine of these dealt with the FOIA exemption for trade secrets embodied in 5 U.S.C. § 552(b)(4), and in all instances, documents were released only after certain confidential information was excised. Thus, the CPSC's own Annual Report discloses that the trade secrets exemption alone has created a more serious "burden" than Section 6(b)(1) is likely to do.

the CPSC already must carefully scrutinize all information before disclosing it pursuant to the FOIA and whatever "burden" is imposed upon the agency by the decision below will add little to its present obligations.[10]

In any event, as previously noted, compliance with the opinions of the courts below requires only minimal effort on the part of the CPSC. "Clearly defining the data that it sought and seeking full compliance with its subpoenas were but two reasonable steps which the Commission could have taken to assure that the information was accurate." 404 F. Supp. at 371 (footnote omitted). The CPSC, therefore, can meet the requirements of Section 6(b)(1) by tailoring its requests for information in such a manner as to assure that it obtains only accurate and reliable data.[11] The fact that "reasonableness" of inquiry or draftsmanship is all that is required of the CPSC certainly vitiates any attempt by petitioners to assert that some enormous "administrative burden" warrants review of the decision below by this Court.

2. Neither the Purported Conflict nor the Alleged Error of the Court Below Makes Review Appropriate at This Time.

Petitioners argue that this Court's review of the decision below is needed to resolve a perceived conflict

[10] In this case, respondents *voluntarily* complied with the demands of the CPSC for the submission of confidential, inaccurate, and unverified information. However, such voluntary compliance would be discouraged in the future if the CPSC were permitted to prevail in its position that there is no statutory assurance that such information—not otherwise available to the public—will not be disclosed to FOIA requesters. By thus impeding the ability of the CPSC to obtain the information it deems necessary to carry out its functions, the position of the CPSC would seem to create a more serious burden than that of which it complains in the petition for certiorari.

[11] Of course, a balancing of interests is involved. If the CPSC in its own discretion decides that unverified and inaccurate information is needed in its data base for rulemaking or investigatory purposes, then it should be prepared to deny release of such information pursuant to the FOIA.

between two circuits on the question of the applicability of Section 6(b)(1) of the CPSA to FOIA requests.[12] We suggest that review of the decision is not necessary at this time because of the divergent factual backgrounds of the cases presented to the only two circuits that have ruled on the issue and the overbroad reading petitioners give the decision below. (*See* pp. 9-13, *supra.*) This Court should at least stay its hand until other courts have had an opportunity to resolve any perceived conflict,[13] and to align themselves with the conclusion reached by the Third Circuit, as we are confident that they will.

Petitioners do not discuss the significant background of this litigation that led to the entry of the preliminary and permanent injunctions by the District Court. Judge Latchum repeatedly noted that the misleading, unverified, and inaccurate information proposed to be released was obtained from the manufacturers by the CPSC's own notice, orders, and subpoenas. The ambiguities in the document requests, the CPSC's failure to demand uniform compliance with the requests, and the unjustifiable and irreparable damage that could befall the manufacturers because the data do not form any reliable foundation for safety comparisons were all critical findings made by the District Court that the CPSC did not (and, indeed, could not) challenge on appeal. (*See* App. A 26a-27a.) None of these factors was presented to the Second Circuit in *Pierce & Stevens Chemical Corp.* v. *Consumer Product Safety Commission*, 585 F.2d 1382 (2d Cir. 1978), the decision with which the decision below purportedly conflicts.

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[12] Rule 19 of the Revised Rules of this Court states that the existence of an intercircuit conflict is "neither controlling nor fully measuring the court's discretion."

[13] As stated by Mr. Justice Frankfurter respecting a denial of a petition for a writ of certiorari, "It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening." *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 918 (1950).

Pierce & Stevens involved an FOIA request by an injured consumer for a copy of a plant inspection report prepared by the Food and Drug Administration pursuant to the Federal Hazardous Substances Act, 15 U.S.C. §§ 1261 *et seq.*, that later came into the possession of the CPSC. That is a far cry from the case at bar where at issue is *private* information obtained in a fashion that itself made the information inaccurate and its proposed publication misleading. Respondents submit that had the Second Circuit had before it the facts of this litigation, it might very well have reached the same result as did the Third Circuit.[14]

In determining that Section 6(b)(1) prohibits the CPSC's proposed release of information in this case, the Third Circuit focused on four significant points. A brief discussion of each of these points will illuminate the opinion below and demonstrate both its correctness as a matter of law and its emphasis on the facts of the case before it, facts that did not exist in *Pierce & Stevens.*

First, after a careful and thorough analysis of the language of Section 6(b)(1) and its relation to the rest

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[14] Mr. Justice Harlan noted:

> [D]ifferences between the Courts of Appeals in two or more Circuits will not be accepted as a conflict if they can fairly be accounted for on the basis of variations in the factual situations among the cases involved. Finally, even where a "true" conflict may be said to exist, *certiorari* will sometimes be denied where it seems likely that the conflict may be resolved as a result of future cases in the Courts of Appeals.

Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austl. L.J. 108, 111-12 (1959). The issue of Section 6(b)(1)'s applicability to FOIA requests is fully briefed and before the United States District Court for the Northern District of Illinois on a motion for summary judgment filed by the defendants in *International Harvester Co.* v. *Consumer Product Safety Commission*, No. 79 C 1185. Since the CPSC has not acquiesced in the decision below as to the applicability of Section 6(b)(1) to FOIA requests, it seems reasonable to believe that to the extent this issue arises again other courts will be able to contribute their insight.

of the statute, the Third Circuit rejected the CPSC's argument that it should defer to the agency's interpretation of the provision, applying it only to information "affirmatively released" (*i.e.*, press releases or speeches). Instead, the Court of Appeals concluded that the provision applies to both CPSC-initiated disclosures and the release of information pursuant to the FOIA. (App. A 32a-41a.) The court found persuasive the fact that Congress did not include the disclosure of information pursuant to an FOIA request among the specific exemptions to the requirements of Section 6(b)(1) set forth in Section 6(b)(2), 15 U.S.C. § 2055(b)(2). (App. A 38a, 40a-41a.) The court also noted that pursuant to Section 25(c) of the CPSA, 15 U.S.C. § 2074(c), the CPSC is required to disclose accident and investigation reports to the public but only to the extent permitted by Section 6(a)(2) (prohibiting disclosure of trade secret information protected by 18 U.S.C. § 1905) and Section 6(b)(1). Thus, "section 25(c) makes section 6(b) applicable to at least some information obtained or generated by the Commission, the disclosure of which could be requested under the FOIA." (App. A 39a.)

Second, based on its careful analysis of the legislative history of the CPSA, the Court of Appeals concluded that the information disclosure requirements of the Act were intended to protect manufacturers from the harmful effects of inaccurate or misleading public disclosure by the CPSC, through any means, of material obtained pursuant to its uniquely broad information-gathering powers. (App. A 59a.) Thus the court held that Congress designed Section 6(b)(1) to limit the CPSC's authority to release such material by requiring the agency to take reasonable steps to assure that information disseminated to the public (whether affirmatively or pursuant to the FOIA) would be accurate and fairly presented.

Third, upon the urging of the CPSC, the court examined a Conference Committee Report on the Consumer Product

Safety Commission Improvements Act of 1976, which, in the course of discussing a new provision to be added to the CPSA, apparently adopted the agency's interpretation of Section 6(b)(1). (App. A 54a-57a.) The court was unpersuaded by this rather gratuitous statement in one of the several reports discussing the 1976 amendments, which themselves did not address in any way the scope of Section 6(b)(1) which was enacted in 1972, and concluded:

> Given our view that the legislative history of section 6(b)(1) itself strongly supports an inference that the Commission's interpretation of that provision conflicts with the intent of the Congress that enacted it, we are unwilling to accept the isolated, and in our view erroneous, conclusion of a later congressional committee as persuasive authority to the contrary.[15]

(App. A 56a.)[16]

Fourth, the Court of Appeals addressed the CPSC's argument that the interpretation of Section 6(b)(1) reached by the lower court renders that provision inconsistent with the scheme of the FOIA. (App. A 60a-63a.) The court held that any apparent inconsistencies between the two statutes were unpersuasive given its conclusion that Section 6(b)(1) is a withholding statute of the kind described by Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3). (App. A 60a-63a.) In contrast to peti-

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[15] The District Court reached a similar conclusion based on the reasons noted by the Court of Appeals and on the additional reasoning that the Conference Committee was merely discussing "the need for some sort of accommodation between the different time restraints imposed by Section 6(b) and the FOIA." (App. C 84a; *see* p. 18, n.17, *infra*.) Significantly, the District Court emphasized that "the [Conference Committee] statement does not make Section 6(b) altogether inapplicable in the face of a FOIA request, as the Commission would do." (App. C 84a.)

[16] The court also noted that the language of the Conference Committee was inconsistent with the fact that "section 25(c) of the CPSA, by its terms, applies the requirements of section 6(b)(1) to FOIA requests for accident investigation reports." (App. A 57a.)

tioners, who rely heavily on the differing time limitations provided by Section 6(b)(1) and the FOIA, the court discussed several means by which these two limitations could be reconciled.[17]

In short, the Third Circuit concluded that Congress made a considered judgment that the CPSC was not to release information identifying a particular manufacturer unless it first notified the manufacturer of its intent to do so and took reasonable steps to satisfy itself of the accuracy and fairness of the proposed disclosure. (App. A 66a.) The court also pointed out that the CPSC's proposed interpretation of Section 6(b)(1) as applied to the facts of this litigation would effectively eviscerate the Congressional design:

> Congress's concern that manufacturers might be harmed by the public disclosure of inaccurate and misleading information obtained by the Commission is implicated in this case to the same extent that it would be implicated by a Commission press release. *The Commission obtained the material at issue, otherwise unavailable to the public, through its information-gathering authority under the CPSA.*

(App. A 68a; emphasis added.)

* * * *

The Third Circuit's decision was clearly correct under the facts presented. The legislative intent in enacting Section 6(b)(1) must outweigh any concern as to the

[17] It is important to note that the specific 30-day notice provision of the CPSA's Section 6(b)(1) was enacted in 1972 (Pub. L. No. 92-573, 86 Stat. 1212) and the more general requirement that agencies rule on FOIA requests within 10 days (*see* 5 U.S.C. § 552(a)(6)(A)(i)) in 1974, some two years later (Pub. L. No. 94-502, 88 Stat. 1561). Additionally, Section 6(b)(1) itself provides for a shortening of the 30-day period in appropriate circumstances. Moreover, in complex FOIA requests such as these where thousands of documents are sought, it is inconceivable that any requester would expect the agency to produce all such documents within 10 days. It took 10 months for the CPSC to review the documents in issue in this case, and the requesters acquiesced (as they had to) in the agency's timetable.

administrative burden created by the provision—a burden we have already demonstrated is more imagined than real. (*See* pp. 9-13, *supra.*) The only other asserted ground for granting certiorari is the alleged conflict between the decision in this case and the *Pierce & Stevens* decision. Although the interpretations of the scope of Section 6(b)(1) in the two cases are clearly divergent, the factual backdrops are so different that it is questionable whether the two decisions really do conflict. It would be better for this Court to await consideration of the issue by other circuits before deciding the issue itself.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 13, 1979

No. 79-521

In the Supreme Court of the United States

OCTOBER TERM, 1979

CONSUMER PRODUCT SAFETY COMMISSION, ET AL.,
PETITIONERS

v.

GTE SYLVANIA, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-70a) is reported at 598 F.2d 790. The opinion of the district court (Pet. App. 77a-104a) is reported at 443 F. Supp. 1152. Earlier opinions of the district court are reported at 438 F. Supp. 208 and 404 F. Supp. 352 (A. 92-124).

JURISDICTION

The judgment of the court of appeals (Pet. App. 71a-76a) was entered on April 30, 1979. On July 20, 1979, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including August 28, 1979, and on August 21, 1979, he further extended the time to and including September 27, 1979. The petition was filed on that date and was granted on December 3, 1979 (A. 177). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 6(b)(1) of the Consumer Product Safety Act, 15 U.S.C. 2055(b)(1), applies to the disclosure of records by the Consumer Product Safety Commission pursuant to a request under the Freedom of Information Act.

STATUTE INVOLVED

Section 6(b)(1) of the Consumer Product Safety Act, 15 U.S.C. 2055(b)(1), provides:

> Except as provided by paragraph (2) of this subsection, not less than 30 days prior to its public disclosure of any information obtained under this chapter, or to be disclosed to the public in connection therewith (unless the Commission finds out that the public health and safety requires a lesser period of notice), the Commission shall, to the extent practicable, notify, and provide a summary of the information to, each manufacturer or private labeler of any consumer product to which such information pertains, if the manner in which such consumer product is to be designated or described in such information will permit the public to ascertain readily the identity of such manufacturer or private labeler, and shall provide such manufacturer or private labeler with a reasonable opportunity to submit comments to the Commission in regard to such information. The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this chapter. If the Commission finds that, in the administration of this chapter, it has made public disclosure of inaccurate or misleading information which reflects adversely upon the safety of any consumer product, or the practices of any manufacturer, private labeler, distributor, or retailer of consumer products, it shall, in a manner similar to that in which such disclosure was made, publish a retraction of such inaccurate or misleading information.

STATEMENT

1. In 1972, Congress enacted the Consumer Product Safety Act, 15 U.S.C. 2051 *et seq.*, in order "to protect the public against unreasonable risks of injury associated with consumer products" and "to assist consumers in evaluating the comparative safety of consumer products" (15 U.S.C. 2051(b)(1) and (2)). The Act established the Consumer Product Safety Commission to carry out the statutory pur-

poses. 15 U.S.C. 2053. The Commission is empowered, *inter alia*, to collect and disseminate product safety information, 15 U.S.C. 2054(a)(1), to conduct research and tests on consumer products, 15 U.S.C. 2054(b)(1) and (2), to promulgate safety standards, 15 U.S.C. 2056, and to ban hazardous products, 15 U.S.C. 2057.

Section 6 of the Act, 15 U.S.C. 2055, regulates "public disclosures of information" by the Commission. In particular, Section 6(b)(1) requires that at least 30 days before the public disclosure of information pertaining to a consumer product, the Commission must notify the manufacturer and provide it with a summary of the information to be disclosed, if the product is to be designated or described in such a way as to permit the public to ascertain readily the manufacturer's identity. The Commission also must give the manufacturer a reasonable opportunity to submit comments regarding the information to be disclosed.

Section 6(b)(1) further requires that, prior to public disclosure, the Commission must take reasonable steps to assure that the product safety information, from which the identity of a product's manufacturer may be readily ascertained, is accurate and that disclosure is "fair in the circumstances and reasonably related to effectuating the purposes" of the Act. In addition, if the Commission finds that it has made public disclosure of inaccurate or misleading information that reflects adversely on a manufacturer's products or practices, Section 6(b)(1) requires that the Commission "publish a retraction" in a manner "similar to that in which such disclosure was made * * *."

2. In March 1974, the Commission initiated an administrative proceeding to examine the safety of television sets. See 39 Fed. Reg. 10929 (1974). In connection with that proceeding, the Commission obtained from respondents, who are television manufacturers, reports of television-related accidents (*e.g.*, fires, electric shocks, etc.). The Commission acquired this information (more than 120,000 pieces of paper) partly through requests and partly through special orders and subpoenas issued under 15 U.S.C. 2076(b)(1) and (3). Claims of confidentiality accompanied the information submitted by most of the manufacturers (Pet. App. 11a-12a).[1]

In June 1974, Consumers Union of the United States, Inc., and Public Citizen's Health Research Group filed a request under the Freedom of Information Act, 5 U.S.C. 552 ("FOIA"), asking the Commission to disclose the television-related accident reports. The Commission disclosed those portions of the reports as to which no claim of confidentiality had been made. With respect to the rest, it directed the

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[1] To reduce the information obtained to manageable form, the Commission retained a private company to catalogue the accident data. In addition, a Commission consultant helped to process, analyze, and summarize the data. As a result of these efforts, "the Commission now has nine file cabinets containing information on 7,620 TV-related accidents, each of which is in a separate file folder under the manufacturer's name * * *." See A. 131.

manufacturers to substantiate their claims of confidentiality (Pet. App. 13a). The manufacturers responded by asserting that the information had been compiled in connection with an administrative investigation, that it was exempt from mandatory disclosure under Exemptions 4 and 7 of the FOIA, 5 U.S.C. 552(b)(4) and (7), and that disclosure would violate the FOIA and the Trade Secrets Act, 18 U.S.C. 1905 (A. 55-64).

On April 8, 1975, after further communication with the manufacturers and the requesters, the Commission informed the parties of its legal determination that the requested reports were not exempt from mandatory disclosure under the FOIA and that the Commission would therefore release the reports, excluding only the identity of accident victims and any documents subject to the attorney-client privilege or the attorney-work product doctrine (A. 65-76).[2] The Commission added that the release of the data would be accompanied by a statement that "the information could be misleading because some television manu-

[2] The Commission also announced that technical data submitted by the manufacturers would not be released if the data had "been kept confidential by the company and * * * might cause substantial harm to the company if released" (A. 65). The materials in this category included engineering studies and other reports prepared at company expense, not disclosed to the public, and discussing "manufacturing techniques, processes, and the like that are unknown to other TV manufacturers and not available from outside sources" (A. 76).

facturers maintained more complete accident records than other manufacturers" (A. 66, 134).[3]

3. In April and May 1975, respondents (12 television manufacturers) instituted separate suits in the United States District Court for the District of Delaware and three other federal district courts, seeking to enjoin the Commission and certain of its officers and employees from disclosing the television-related accident reports in response to the FOIA requests. The complaints reiterated the manufacturers' previous claims that disclosure would violate the FOIA and the Trade Secrets Act. The complaints also alleged, for the first time, that disclosure would violate Section 6(b)(1) of the Consumer Product Safety Act, 15 U.S.C. 2055(b)(1). Respondents asserted, *inter alia*, that the "information contained in the materials to be disclosed is inaccurate and misleading; and disclosure would not be fair in the circumstances or reasonably related to effectuating the

[3] In *Pierce & Stevens Chemical Corp.* v. *United States Consumer Product Safety Commission*, 585 F.2d 1382 (1978), which also involved a suit to enjoin a Commission disclosure under the FOIA, the Second Circuit noted that the Commission had offered to include with the disclosed records in that case a statement by the manufacturer regarding alleged inaccuracies in the records. The court commended the procedure, stating that, although not required by law, "this procedure is a sensible and fair accommodation of the manufacturers' and labelers' interests and we encourage the Commission to continue the practice." *Id.* at 1388 n.28. The Commission has generally followed this procedure whenever a manufacturer or labeler of a consumer product has objected to this kind of disclosure.

purposes of the Consumer Product Safety Act" (see, *e.g.*, A. 31).

Respondents' suits were consolidated in the United States District Court for the District of Delaware. On October 23, 1975, the district court entered a preliminary injunction prohibiting the Commission from disclosing the requested documents. 404 F. Supp. 352 (A. 89-124). On December 8, 1977, the district court permanently enjoined the Commission from disclosing the documents. 443 F. Supp. 1152 (Pet. App. 71a-104a). The court rejected the Commission's contention that Section 6(b)(1) applies only when the Commission affirmatively undertakes to disclose information to the public and not when it merely complies with a request for information under the Freedom of Information Act. The court held that Section 6(b)(1) is applicable to disclosures in response to FOIA requests and that it is a withholding statute within the meaning of Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3). The court also found that the Commission failed to comply with the Section 6(b)(1) procedures in this case and that release of the accident reports would therefore be contrary to the Act (Pet. App. 97a-98a).[4]

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[4] The requesters, Consumers Union and the Health Research Group, chose not to intervene in the Delaware action (Pet. App. 18a). Instead, on May 5, 1975, they brought suit under the FOIA in the United States District Court for the District of Columbia seeking to compel the Commission to release the identical documents at issue in this case. That lengthy and "tortuous" litigation (*ibid.*), which is now before this Court in *GTE Sylvania, Inc.* v. *Consumers Union of the United States*, No. 78-1248 (argued Nov. 28, 1979), presents the question whether the District of Columbia Circuit erred in holding that the permanent injunction obtained by respondents in the District of Delaware does not bar the requesters from litigating their separate FOIA action in the District of Columbia.

Consumers Union and the Health Research Group appeared in this case for the first time in the court of appeals as amici curiae to argue that they were indispensable parties within the meaning of Fed. R. Civ. P. 19 and that respondents' complaints should therefore have been dismissed in their absence. The court of appeals rejected this argument (Pet. App. 20a-26a).

The court of appeals affirmed. The court declined to follow the decision of the Second Circuit in *Pierce & Stevens Chemical Corp.* v. *United States Consumer Product Safety Commission*, 585 F.2d 1382, 1388-1389 (1978), which specifically held that "the procedures of Section 6(b)(1) do not apply when the Commission merely responds to a request under the FOIA." Instead, the court of appeals concluded from the language and legislative history of Section 6(b)(1) that "Congress did not intend that provision to apply only to Commission press releases, news conferences, publication of reports and other forms of 'affirmative disclosure' of information obtained under the Act" (Pet. App. 58a-59a). The court held that Section 6(b)(1) was "meant to protect manufacturers from the harmful effects of inaccurate or misleading public disclosure by the Commission, through any means, of material obtained pursuant to its broad information-gathering powers" (*id.* at 59a).[5]

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[5] In view of their conclusion that Section 6(b)(1) of the Consumer Product Safety Act prohibits disclosure of the

SUMMARY OF ARGUMENT

A. Compliance with Section 6(b)(1) of the Consumer Product Safety Act is not a prerequisite for a Commission response to a Freedom of Information Act request, because Section 6(b)(1)'s procedural protections are not needed and were never intended to apply in the FOIA context. Section 6(b)(1) was enacted to provide adequate safeguards when the Commission makes public disclosures of information at its own initiative in the course of carrying out its responsibilities under the Consumer Product Safety Act. In those situations, the Commission decides to disseminate consumer product safety information in order to educate the public about the dangers associated with the use of particular products and the best ways to avoid or minimize risks to health and life. The Commission explicitly or implicitly represents that it believes the disclosed information to be true and that the public should rely on it. In this context, when a governmental agency places its authority behind statements about a particular product, manufacturer, or labeler, the requirements of Section 6(b)(1) are meaningful and appropriate. The Commission must (1) give affected manufacturers

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television-related accident reports, neither the district court nor the court of appeals reached respondents' further contentions that the reports are exempt from mandatory disclosure under Exemptions 4 and 7 of the FOIA and that release of the reports would be an abuse of the Commission's discretion under the FOIA and would violate the Trade Secrets Act.

and labelers notice and an opportunity to comment before disclosure, (2) make reasonable efforts to assure that the information is accurate and that disclosure is fair under all the circumstances, and (3) publish an effective retraction if after disclosure the Commission discovers that the information is inaccurate or misleading.

But these requirements are wholly unnecessary when the Commission merely releases information in response to a FOIA request, and Congress never intended them to govern in that setting. The FOIA was designed to improve knowledge about and aid evaluation of the governmental process by opening agency action to public scrutiny. In responding to a FOIA request, an agency is obliged simply to release whatever materials it possesses and controls that are reasonably described in the request. The agency is not expected to, and does not, make any statement regarding the content of the documents released or the extent to which those documents reflect agency policy. No governmental approval or disapproval is expressed or implied. This general rule applies with special force when the requested materials are documents and reports generated outside the agency, as in the present case. Because neither the Commission nor any other federal agency makes any representation concerning the quality of the information disclosed in response to a FOIA request, Congress perceived no need to require that an agency disclosing documents under the FOIA take steps to ensure that the disclosure is fair and accurate. Section 6(b)

(1) should not be construed to impose such a requirement on the Commission.

This interpretation of the scope of Section 6(b)(1), derived from the different purposes of the Consumer Product Safety Act and the FOIA, finds substantial support in the disparity between the procedural details that ordinarily characterize agency responses to FOIA requests and those that would apply if the court of appeals' ruling were permitted to stand. Agency responses under the FOIA are required to be prompt and do not entail any inquiry into the accuracy of the requested records, the fairness of their disclosure under the circumstances, or the strength or legitimacy of the requester's interest in the records. The delay and additional investigation that the court of appeals' decision would impose would run counter to the policy objectives that the FOIA was enacted to achieve.

In addition, the internal organization of Section 6 of the Consumer Product Safety Act demonstrates that the requirements of Section 6(b)(1) do not apply in the FOIA context. Section 6(a) is addressed to the exemptions from mandatory disclosure under the FOIA and the withholding of information by the Commission. Section 6(b), by contrast, is not a withholding statute. It merely establishes certain procedures that the Commission must follow before it publicly discloses product safety information backed by the Commission's own authority and prestige.

Finally, application of Section 6(b)(1) in the FOIA setting would have serious practical consequences for the Commission's ability to perform its statutory duties. The court of appeals' ruling apparently would require that the Commission investigate the accuracy of each item of information requested under the FOIA and the fairness of disclosure in each instance. Congress could not have intended to impose such an administrative burden, which would give FOIA requesters an unwarranted measure of control over the Commission's use of its limited resources.

B. Section 6(b)(1)'s inapplicability to FOIA requests is further evidenced by the legislative history of the Consumer Product Safety Act, the Commission's consistent interpretation of the disputed provision, and subsequent action by Congress.

The legislative history of the Act demonstrates that Section 6(b)(1) was designed to avoid the evil of Commission-initiated disclosures of inaccurate or misleading information about particular products. During the congressional hearings on the relevant bills, business representatives expressed concern about the harm that manufacturers might suffer as the result of the release of inaccurate information "[i]ssued under the dignity and with the apparent imprimatur of the U.S. Government * * *." The witnesses testified that the danger would be particularly acute if affected parties were not first given an opportunity to comment on information that the Commission proposed to disclose on its own authority and with its endorsement. Section 6(b)(1) was the legislative response to this potential

problem. Congress never suggested that the provision should apply in the context of an agency response to a FOIA request.

Later legislative events confirm the view that the procedural requirements of Section 6(b)(1) are inapposite in the FOIA setting. During oversight hearings in January 1976, Representative Moss, the original sponsor of the Consumer Product Safety Act in the House of Representatives, expressed his agreement with the Commission's interpretation of the statute. Moreover, later the same year, when Congress amended the Act to prescribe the conditions under which the Commission may provide accident and investigation reports to other federal agencies and state and local health and safety authorities, the newly added provision explicitly made Section 6(b) applicable to public disclosures by agencies receiving information from the Commission. With equal explicitness, the accompanying conference report stated that Section 6(b) is not intended to apply to "disclosure[s] initiated by a specific request from a member of the public under the Freedom of Information Act." H.R. Conf. Rep. No. 94-1022, 94th Cong., 2d Sess. 27 (1976).

The contemporaneous and subsequent evidence of congressional intent fully accords with the consistent construction of Section 6(b)(1) by the agency charged with the responsibility for the statute's administration. Such a construction is entitled to deference even in the ordinary case, but the general principle is particularly compelling here. The statutory interpreta-

tion challenged by respondents was adopted by the administrators who first set the Consumer Product Safety Act's machinery in motion. Moreover, when Congress revisited and amended the statute, it not only left the Commission's practice undisturbed but embraced the agency's position and enacted an amendment that would produce a substantial statutory anomaly if the court of appeals' decision in the present case were sustained.

ARGUMENT

SECTION 6(b)(1) OF THE CONSUMER PRODUCT SAFETY ACT DOES NOT APPLY TO THE COMMISSION'S RESPONSES TO REQUESTS FOR INFORMATION UNDER THE FREEDOM OF INFORMATION ACT

A. The Different Purposes of the Two Statutes and the Incompatibility of Their Procedures for Disclosure of Information Demonstrate that the Requirements Governing the Commission's Public Disclosures Under the Consumer Product Safety Act Were Not Intended to Apply In the FOIA Context

1. One of the primary tasks entrusted by Congress to the Consumer Product Safety Commission is the dissemination of information concerning possible safety hazards associated with particular consumer products and appropriate safety standards for such products. The theme of informing the public runs throughout the Act. Section 5(a)(1), for example, directs the Commission to maintain an Injury Information Clearinghouse "to collect, investigate, analyze, and disseminate injury data, and informa-

tion, relating to the causes and prevention of death, injury, and illness associated with consumer products * * *." 15 U.S.C. 2054(a)(1). Section 7(d)(3)(C) instructs the Commission to promulgate regulations requiring developers of consumer product safety standards to maintain publicly available records of the course of a given standard's development and the comments and information submitted in connection with that process. 15 U.S.C. 2056(d)(3)(C); 16 C.F.R. 1105.7(c). Section 15(c) empowers the Commission, if it determines that a product presents a substantial hazard, to order the manufacturer or any distributor or retailer of the product to notify the public of the defect and also to mail notice to each manufacturer, distributor, and retailer and to every person known to have purchased or received the product. 15 U.S.C. 2064(c). In an imminent hazard action brought by the Commission under Section 12 of the Act, one form of judicial relief explicitly contemplated by the statute is a "mandatory order" directing the defendant manufacturer, distributor, or retailer to give public notice of the serious risk associated with the product and also to notify past purchasers of the danger. 15 U.S.C. 2061(b). Section 27(j) of the Act requires the Commission to prepare and deliver a comprehensive annual report on its activities to the President and Congress and to include in that report a statement of "the extent to which technical information was disseminated to the scientific and commercial communities and consumer information was made available to the public * * *."

15 U.S.C. 2076(j)(7). Finally, Section 29(e) authorizes the Commission to share its accident and investigation reports with other federal and state agencies engaged in activities relating to health, safety, or consumer protection. 15 U.S.C. 2078(e).

As the foregoing review demonstrates, a substantial part of the Commission's activity in performing its statutorily prescribed duties involves the public disclosure of information regarding the safety of consumer products. Section 6 of the Act is addressed to the various forms of public disclosure undertaken by the Commission in the course of fulfilling these responsibilities.[6] In particular, the procedures required by Section 6(b)(1) were intended by Congress to ensure that the Commission, in exercising its public disclosure function under the Act, would disseminate reliable product information in a way that is fair to both manufacturers and the consuming public. Section 6(b)(1) is part of the Consumer Product Safety Act, and it applies only to disclosures made by the Commission in the course of performing its duties under that Act to gather information, analyze it, and report the results of its investigations to the public.

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[6] Of course, not every form of public disclosure described in the Act is subject to the requirements of Section 6(b)(1). Section 6(b)(2) of the Act expressly provides that paragraph (1) shall not apply to certain disclosures, including disclosures of information about products as to which the Commission has filed an imminent hazard action under Section 12 and disclosures "in the course of or concerning any administrative or judicial proceeding" under the Act.

Section 6 has no impact on disclosures that the Commission may make for other purposes, such as compliance with a request under the Freedom of Information Act, except to the extent that Section 6 (a)(1) expressly preserves the exemptions from mandatory disclosure contained in subsection (b) of the FOIA, 5 U.S.C. 552(b). This conclusion is hardly surprising. The FOIA is a completely different statute enacted at a different time and for a different purpose. The FOIA applies not only to the Consumer Product Safety Commission but to government agencies generally. The statute is concerned not with any particular set of substantive problems in society at large but with the operation of the federal government. To be sure, both the FOIA and the Consumer Product Safety Act provide for the disclosure of information to members of the public. But the kinds of disclosures envisioned by the two statutes and the reasons for those disclosures are wholly distinct.

As this Court has explained, the FOIA "seeks to permit access to official information long shielded unnecessarily from public view * * *." *EPA* v. *Mink*, 410 U.S. 73, 80 (1973). The congressional goal was " 'to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.' " *Department of the Air Force* v. *Rose*, 425 U.S. 352, 361 (1976), aff'g and quoting 495 F.2d 261, 263 (2d Cir. 1974). The statute was designed to let the public learn, to the greatest extent practicable, how the agencies of the federal government work: what information they collect and have collected, what decisions they have made and actions they have taken, and on what basis they have shaped their behavior. In short, the FOIA is concerned with informing the public about the governmental process, in order "to ensure an informed citizenry * * * and to hold the governors accountable to the governed" (*NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)); the statute does not seek to educate the public about particular substantive problems.

As a consequence, the substantive reliability of information disclosed in response to FOIA requests is of little or no relevance to the achievement of the statute's purposes. A government agency's response to a FOIA request must be reliable in the sense that it must accurately disclose the information that the agency possesses in connection with the subject matter of the request, but there is no requirement that the disclosed information itself be reliable. That is because the FOIA is intended to allow the public to discover what the government knows and what the government is doing; it is not designed to provide substantively correct answers to questions of public importance.

The congressional purpose underlying the FOIA contrasts sharply with the information dissemination function performed by the Commission under the Consumer Product Safety Act. The Commission's obligation under the Act is to inform the public as fairly and accurately as possible about the safety hazards associated with particular consumer products

and what measures ought to be taken to avoid or minimize the risks to life and health arising from the use of such products. The public need for reliable information on such matters, and the congressional expectation that the Commission will develop and disseminate reliable information in a way that is "fair in the circumstances and reasonably related to effectuating the purposes" of the Act, together explain the inclusion of Section 6(b)(1) in the statute. Congress sought to ensure that, whenever the Commission, in fulfilling its public education responsibility, proposes to distribute information about a particular consumer product, the affected manufacturers (and private labelers) will first be given an opportunity to comment on the disclosure and the Commission will then take "reasonable steps" to assure that the proposed disclosure is accurate and fair.

These procedural requirements make perfect sense when the Commission disseminates information at its own initiative and with its endorsement for the purpose of influencing public behavior with respect to particular consumer products. Educating the public is one of the Commission's major functions under the Act. Before lending its authority to a public announcement of product information, it goes without saying that the Commission should make a responsible effort to assure that the information is accurate. The critical factor in such a situation is that the Commission places its weight and official role behind the information and expects the public to rely on the

disclosure, in large measure because the Commission has made it. Under such circumstances, when the Commission in effect vouches for the accuracy of the information, the public is entitled to expect that the Commission has a reasonable basis for its position and, by the same token, manufacturers and private labelers have a right to insist that their products not be disparaged unfairly. Section 6(b)(1) is intended to address these legitimate concerns.

But the procedural requirements of Section 6(b)(1) simply have no place in the context of a Commission response to a FOIA request. In that situation, the Commission vouches for nothing. There is no official endorsement of a particular view; there is only a release, under statutory compulsion, of all documents that are reasonably described in the request and that happen to be in the agency's possession and control. 5 U.S.C. 552(a). The rationale for the inclusion of Section 6(b)(1) in the Consumer Product Safety Act is no more applicable when the Commission responds to a FOIA request than when any other federal agency responds to such a request. In neither event is the governmental response accompanied by anything remotely resembling an official "seal of approval." The agency simply releases the records it possesses, without comment, and the requester is left to interpret the records for himself. Indeed, the Commission, in order to make absolutely certain that no misimpression is created by its responses to the FOIA requests at issue in this case, has decided as a policy matter to append to those re-

sponses a statement that the information may be misleading because of variations in accident reporting policies among the different respondent manufacturers. See pages 6-7, *supra*.[7]

The Commission's disclosure of information under this statutory obligation is clearly distinguishable from the disclosures to which Section 6(b)(1) was intended to apply. In responding to a FOIA request, the Commission expresses no opinion and makes no attempt to influence public behavior. It does not attach the government's imprimatur to any position with respect to a particular product's safety. It merely performs a ministerial task intended to inform the public of the information in the agency's possession, not the completeness or the reliability of that information. The Commission implicitly represents only that the disclosed materials are all the materials within its custody and control that relate to the subject matter of the request; only as to this representation does the agency have an obligation to be accurate. A FOIA disclosure entails no statement concerning the conclusions that can or should be drawn from the information released, and since no

[7] It should be emphasized that a federal agency's decision to respond to a FOIA request is not discretionary. The lower courts in the present case have not yet decided whether the accident reports submitted by respondents fall within one or more of the FOIA's exemptions from mandatory disclosure (see note 5, *supra*), and the question currently before this Court therefore must be resolved on the assumption that no such exemption properly applies to the information now in dispute. In such a situation, the Commission, like any other federal agency, has no choice but to comply with a FOIA request.

such statement is involved, the disclosing agency has no obligation to guarantee that the information sought is reliable. This is particularly so where, as here, the requested reports were generated outside the Commission. Accordingly, the potential problem that Section 6(b)(1) was intended to avoid—substantive error by the Commission—cannot occur in the FOIA context, and the procedural protections provided in the statute therefore do not apply.

2. The conclusion thus derived from a comparison of the general purposes of the FOIA and the Consumer Product Safety Act is amply supported by reference to the incompatibility between the detailed provisions governing disclosures of information under the two statutes. Moreover, the internal structure of Section 6 itself strongly suggests that Congress did not intend the procedural requirements of Section 6(b)(1) to apply in the FOIA context. Finally, the additional administrative burden that the court of appeals' interpretation of Section 6(b)(1) would impose on the Commission's handling of FOIA requests would significantly hamper the Commission in its ability to achieve the statutory purposes identified in Section 2(b) of the Act, 15 U.S.C. 2051(b). We discuss each of these points in turn.

In the first place, the procedures mandated by Section 6(b)(1) cannot be reconciled with the manner in which federal agencies are required to release information under the FOIA. A primary aim of the latter statute is to ensure promptness in agency disclosure of requested information. 5 U.S.C. 552

(a)(3) directs federal agencies to make requested records "promptly available," and a later subsection requires each agency to "determine within ten days * * * whether to comply with [a FOIA] request" and to notify the requester "immediately" of the agency's determination. 5 U.S.C. 552(a)(6)(A)(i). The FOIA further requires the agency to resolve any administrative appeal of a refusal to disclose within 20 days after filing of the appeal. 5 U.S.C. 552(a)(6)(A)(ii).[8] By contrast, Section 6(b)(1) of the Consumer Product Safety Act explicitly contemplates a delay of at least 30 days to enable a manufacturer or private labeler to comment on a proposed public disclosure of information by the Commission in which the manufacturer's or labeler's products are identified and discussed. A substantial additional delay would probably result in many if not most cases from the Commission's further obligation, before product safety information may be disclosed under Section 6(b)(1), to "take reasonable steps to assure" the accuracy of that information and the fairness of disclosure under all the circumstances. See *Pierce & Stevens Chemical Corp.* v. *United States Consumer Product Safety*

[8] The FOIA permits these time limits to be extended "in unusual circumstances," but in no event for more than 10 working days. 5 U.S.C. 552(a)(6)(B).

The judicial review provisions in the FOIA also evidence the statute's concern for prompt disclosure. Subsection (a)(4)(C) directs a defendant agency to answer any complaint within 30 days, and subsection (a)(4)(D) exhorts the federal courts to give FOIA cases "precedence on the docket" and to "expedite[them] in every way." 5 U.S.C. 552(a)(4)(C) and (D).

Commission, 585 F.2d 1382, 1387-1388 (2d Cir. 1978).

Apart from the delay involved, Section 6(b)(1)'s requirement that the Commission make reasonable efforts to assure the accuracy of product safety information presumably implies a duty on the part of the Commission to revise and correct erroneous materials before their release to the public. Such a duty is inconsistent with a federal agency's more limited obligation under the FOIA simply to release identifiable agency records to any person who requests them. As this Court held in *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 161-162 (1975), the FOIA does not require an agency to create or edit records in any situation in which the agency would not otherwise be obliged to do so. The statute requires only disclosure of existing documents in their existing form. See also *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 192 (1975); *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 23-24 (1967).[9]

By the same token, Section 6(b)(1)'s requirement that the Commission determine, before the public re-

[9] The obligation to recast documents would also be contrary to the congressional purpose in enacting the FOIA. As noted above (see pages 18-19, *supra*), the FOIA was intended to inform the public of the "decisions their government is making" and "the basis on which those decisions are being made." S. Rep. No. 93-854, 93d Cong., 2d Sess. 5 (1974). If an agency's decisions are based on documents later shown to be inaccurate, it is the inaccurate documents, not reworked versions, that Congress sought to have disclosed.

lease of product safety information, "that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of [the Act]" inevitably entails agency consideration of factors that are completely foreign in the context of responding to a FOIA request. If applicable under the FOIA, the fairness and relevance inquiry described in Section 6(b)(1) would involve a weighing of the identity and interest of the requester and the likely use to which he would put the information sought.[10] Such concerns are impermissible in connection with FOIA requests. The latter statute directs that requested information be released to "any person," and it thereby "precludes consideration of the interests of the party seeking relief." *Soucie* v. *David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971). See *NLRB* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 143 n.10; *Getman* v. *NLRB*, 450 F.2d 670, 677-680 (D.C. Cir.), stay denied, 404 U.S. 1204 (1971); *Wellford* v. *Hardin*, 444 F.2d 21, 24-25 (4th Cir. 1971); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 1 (1966) (the FOIA "eliminates the 'properly and directly concerned' test of who shall have access to public records"). Under the FOIA, government agencies are not permitted to weigh equitable factors in connection with the release of requested materials, except to the extent those factors are comprised within one of subsection (b)'s enumer-

[10] For example, a request by a research scientist for product safety information might be treated differently from a request for the same information by a plaintiff in a products liability lawsuit.

ated exemptions from mandatory disclosure. *Federal Open Market Committee* v. *Merrill*, No. 77-1387 (June 28, 1979), slip op. 13.

Finally, Section 6(b)(1) provides that, when the Commission discovers that it has publicly disclosed "inaccurate or misleading information which reflects adversely upon the safety of any consumer product," it must publish a retraction in a manner similar to that in which the original disclosure was made. This requirement, too, is incompatible with the FOIA scheme. There is no continuing governmental obligation under the FOIA to investigate the reliability of records released, and no FOIA requester would regard the fact of release as an assurance of accuracy. Unlike the sorts of Commission-initiated disclosures contemplated by the Consumer Product Safety Act (see pages 15-17, *supra*), an agency that releases records in response to a FOIA request is unlikely to consider the matter further, and there is no significant probability in the ordinary case that the agency will discover inaccuracies or misleading statements in materials previously released. Section 6(b)(1)'s retraction requirement is simply inapposite in this situation.[11]

This incongruity between the provisions of Section 6(b)(1) and the FOIA's procedures for the release of agency records has an obvious explanation: the

[11] Indeed, the express language of the retraction provision in Section 6(b)(1) makes clear that the retraction requirement applies only to public disclosures by the Commission "in the administration of this [Act]," not to releases of information intended solely to comply with another federal statute.

Consumer Product Safety Act and the FOIA operate in different spheres and are designed to serve different values and to achieve different goals. The expedition required by FOIA is important to the legislative purpose of opening agency activity to effective public scrutiny; the 30-day notice period required by Section 6(b)(1) would not serve this end, but it is critical when the Commission intends to make a public disclosure of information backed by the authority of the agency. Likewise, the assurance of accuracy and fairness required by Section 6(b)(1) is unnecessary in the FOIA context (where, by definition, the Commission expresses no opinion) but is indispensable in the context of public disclosures under the Act (where, by definition, the Commission attempts to inform the public about consumer safety issues and to persuade the public to act in accordance with the information provided). The retraction requirement in Section 6(b)(1)'s final sentence is meaningless under the FOIA (because there is nothing to retract in that context) but is important under the Act (because it ensures that the Commission will not permit inaccurate or misleading information disclosed under its aegis to stand uncorrected).

In short, the requirements of Section 6(b)(1) are inextricably intertwined with the character of "public disclosures of information" by the Commission under the Act. The requirements make sense and operate properly when the Commission discloses product safety information accompanied by its endorsement. When such information is supported by the Commission and

released in accordance with the Commission's statutorily prescribed duties, Section 6(b)(1) controls. When no Commission approval is intended or implied, as in the FOIA situation, Section 6(b)(1) does not apply. As the Second Circuit has observed,

> this interpretation of section 6(b)(1) avoids a potential conflict between two statutes, and carries out the intention of both. The Commission may assist consumers by generating in a public forum information regarding consumer products after using the procedures of section 6(b)(1) to insure accuracy, and it may also comply with the FOIA and make prompt disclosure of documents on request.

Pierce & Stevens Chemical Corp. v. *United States Consumer Product Safety Commission, supra*, 585 F. 2d at 1388 (footnote and citation omitted).

This interpretation is also supported by the structure of Section 6 itself. Section 6(a)(1) explicitly preserves all the exemptions from mandatory disclosure under the FOIA, as provided in 5 U.S.C. 552(b). Section 6(a)(2) even goes beyond the FOIA's "trade secret exemption" (5 U.S.C. 552(b)(4)) and prohibits altogether disclosure by the Commission of information that "contains or relates to a trade secret or other matter referred to in [18 U.S.C. 1905] * * *." But Section 6(a) nowhere mentions or refers to the procedural requirements imposed by Section 6(b)(1). That is because those requirements were intended to apply, not to every release of information by the Commission, but only to public

disclosures bearing the Commission's imprimatur. Unlike the FOIA exemptions treated in Section 6(a), Section 6(b)(1) is not a withholding provision. The statute is designed, not to authorize the Commission to prohibit public release of certain product safety information, but to ensure that the Commission adequately safeguards the interests of affected parties before it lends its name and prestige to a public statement about a particular product. When the Commission releases information in some other capacity (*e.g.*, in responding to a FOIA request or a judicial subpoena), the requirements of Section 6(b)(1) do not come into play, because the rationale for their inclusion in the statute is not implicated.[12]

The practical consequences of the court of appeals' contrary conclusion should not be underestimated. The Commission receives nearly 8,000 FOIA requests

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[12] This interpretation of Section 6(b)(1) is further supported by the exception to the subsection's 30-day notice requirement in cases where "the Commission finds out that the public health and safety requires a lesser period of notice * * *." This exception makes little sense as applied to disclosures in response to a FOIA request, because such disclosures are the result of the Commission's statutory obligation to comply with the request rather than a Commission-initiated decision to assist the public. Hence, the term "public disclosure" in the subsection must be read to encompass only the disclosures to the public contemplated elsewhere in the Consumer Product Safety Act. See *Pierce & Stevens Chemical Corp.* v. *United States Consumer Product Safety Commission*, *supra*, 585 F.2d at 1387 ("the phrase 'public disclosure,' used in the title to Section 6 and repeated several times in subsection (b)(1), does imply something more than simply furnishing information upon request").

annually. The vast majority of them request information regarding one or more particular products as to which the manufacturer's or labeler's identity can be readily ascertained. Indeed, the Commission estimates that 95% of the information it obtains (and presumably, therefore, a similar percentage of the information requested) relates to individual products or manufacturers. This information includes approximately 10,000 consumer complaints annually as well as information from other sources. By its nature, the bulk of the information received by the Commission is not self-verifying. The fairness and accuracy of a consumer complaint can rarely be determined from the complaint itself. Yet the court of appeals' ruling would forbid the Commission from complying with FOIA requests for such materials unless the Commission first takes steps in each case to determine whether each item of information requested is accurate and whether disclosure would be fair in the circumstances and reasonably related to the purposes of the Act.

Such particularized investigations (*e.g.*, to determine whether a complaining consumer was in fact injured as alleged and, if not, to correct his complaint) would require a substantial expenditure of administrative time and resources. While the precise practical impact of the court of appeals' decision cannot be calculated in advance, it seems beyond dispute that the ruling will require a significant reallocation of the resources that Congress appropriated for the Commission's substantive programs, such as the de-

velopment and enforcement of product safety standards. Moreover, the Commission cannot avoid this burden; compliance with the FOIA is mandatory. When a request is received, the Commission will have no choice but to undertake the sort of inquiry contemplated by the court of appeals' opinion—an inquiry that no other federal agency must undertake before responding to a FOIA request, no matter how inaccurate or damaging to a manufacturer the information in an agency record might be.[13] This burden will inevitably divert the Commission's attention from the tasks set for it by Congress and will thereby impair the Commission's ability to fulfill its statutory responsibilities. Congress, in enacting Section 6(b)(1), could not have intended to permit the Commission's agenda to be dictated to such an extent by the whim of FOIA requesters, whose purposes are often far different from those that the Commission was created to serve.

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[13] One qualification should perhaps be added to the statement in the text. The court of appeals' opinion may mean that, if the Commission lacks the resources to conduct the inquiry necessary to assure that information requested under the FOIA is accurate and its disclosure fair, the Commission may simply deny the FOIA request. See 5 U.S.C. 552(b)(3). This reading of the court of appeals' opinion would relieve the burden on the Commission discussed in the text, but it would do so at the price of precluding compliance with the FOIA. Congress did not intend that only accurate information would be released under the FOIA, and it did not apply such a requirement uniquely to the Commission in Section 6(b)(1).

B. The Legislative History of the Consumer Product Safety Act, the Commission's Long-Standing Interpretation, and Subsequent Amendments Confirm that Section 6(b)(1) is Inapplicable to Freedom of Information Act Requests

1. The conclusion that Section 6(b)(1) applies only to the Commission's voluntary dissemination of information pursuant to its statutory mandate under the Consumer Product Safety Act, and not to other disclosures such as those pursuant to FOIA requests, is supported by the legislative history of the Act. What is significant in understanding Congress' intent in enacting Section 6(b)(1) is the evil the statute was designed to prevent and the situation "as it was pressed upon the attention of the legislative body." *Holy Trinity Church* v. *United States*, 143 U.S. 457, 463 (1892). See *United Steelworkers of America* v. *Weber*, No. 78-432 (June 27, 1979), slip op. 5-6; *United States* v. *Wise*, 370 U.S. 405, 411 (1962).

Although the pre-enactment history of this legislation does not directly address the precise issue of statutory construction involved in this case, it does indicate that the principal concern underlying adoption of Section 6(b)(1) was the danger that the Commission might at its own initiative disseminate findings, reports, and other product information harmful to manufacturers without first assuring the fairness and accuracy of the disclosure. As a representative from the respondent General Electric Company explained at a House hearing:

> [T]he public dissemination of the information so gathered carries with it a heavy responsibility. Issued under the dignity and with the apparent imprimatur of the U.S. Government, it will be repeated, summarized and carried by the media and so be used in the market place under circumstances and in a manner which the government cannot control. If the information is premature, inaccurate or misleading, the consumers themselves will suffer. If it is identified with a company or a product, it can have serious impact upon reputation, good will and market place results. Accordingly, we urge that the power to disseminate information carry with it the responsibility to be sure of its accuracy and that truth in disclosure be the governing statutory principle.

Consumer Product Safety Act: Hearings on H.R. 8110, H.R. 8157, etc. Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 1st and 2d Sess. 1065-1066 (1971-1972). Other industry spokesmen expressed much the same fears. See *id.* at 306-307, 432, 446-447, 766, 910, 969, 1130, 1196-1197, 1210-1211, 1237, 1318. This concern also was emphasized by the Secretary of Health, Education, and Welfare in his testimony before the Senate Committee. See *Consumer Product Safety Act of 1971: Hearings on S. 983, S. 1685, and S. 1797 Before the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 122-124 (1971).[14]

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[14] During the debates on the House floor, Representative Crane offered an illustration of the need for careful scrutiny of consumer information prior to its voluntary release even as a preliminary official finding (118 Cong. Rec. 31389 (1972)):

> The Federal Trade Commission charged that Zerex was falsely advertised in a television commercial, charges which have since been proven to be untrue. The company, nevertheless, lost sales in 1971 and public confidence because of unfavorable publicity.
>
> What the FTC did was to call a press conference in November 1970 and make a "proposed complaint" against Du Pont, alleging, without proof, that the television commercial was misleading, that the antifreeze actually damaged automotive cooling systems, and that it had been inadequately tested. The Federal Agency then publicly threatened to ban the product.
>
> The commercial in question showed a man stabbing a can of Zerex and streams of antifreeze gushing out and then sealing up. After the FTC charged that this demonstration was phony, newspapers across the country carried stories of the Commission's condemnation of Zerex.
>
> Officials at Du Pont were not even informed of the FTC's action before the Washington press conference. Equally important is the fact that the FTC turned out to be wrong. It dropped the charge of false advertising. It dropped the charge that the product could cause damage. The FTC, in fact, found nothing wrong with the product in any way.
>
> The financial damage had, of course, already been done. Du Pont counted 160 newspaper stories after the initial FTC accusation and only 80, half as many, a year later when the Agency admitted it had been wrong. Twenty front-page stories appeared the first time. The FTC's error received no first page placements a year later.

Because information voluntarily disclosed by the Commission might convey the impression of official support, Congress chose in Section 6(b)(1) to require the agency to make a preliminary determination of accuracy and fairness prior to such release.

There was no similar concern, however, in regard to disclosures not initiated by the Commission. In describing the type of public disclosure to which Section 6 applies, for example, the House Report [15] discusses separately "information which [the Commission] disseminates" (H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. 32 (1972))[16] and information that is released under the compulsion of the FOIA. Whereas the Commission must take steps to assure prior to any agency-initiated public disclosure "that the information which it disseminates is truthful and accurate" (*ibid.*), no such restriction is stated to exist for disclosures made to the public under the Freedom of Information Act (*id.* at 31). As examples of agency activity that would be subject to Section 6(b)(1), the House Report refers to information "released * * * to the news media" or "placed in the Federal Register" and to "publication[s]" (*id.* at 32). As discussed above (see pages 17-23, *supra*), in contrast to these types of disclosures, there is no official imprimatur attaching to materials disclosed under the FOIA, and the House Report accordingly does not suggest that such involuntary disclosures are subject to the requirements of Section 6(b)(1). See *Pierce & Stevens Chemical Corp.* v. *United States Consumer Product Safety Commission, supra*, 585 F.2d at 1387.[17]

[15] The House version of Section 6(b)(1) was the one adopted by the Conference Committee (Pet. App. 41a). See H.R. Conf. Rep. No. 92-1593, 92d Cong., 2d Sess. 41 (1972).

[16] As Representative Moss reminded his colleagues on the House floor, the statute authorizes "the dissemination of educational information [by the Commission] to consumers to help them avoid accidents." 118 Cong. Rec. 31378 (1972). See, *e.g.*, 15 U.S.C. 2054(a).

2. Legislative developments subsequent to passage of the Act confirm that Congress did not intend Section 6(b)(1) to apply to disclosures other than those the Commission undertakes as part of its statutory responsibilities. In testimony before a congressional oversight committee, former Commission Chairman Richard O. Simpson explained that the Commission interpreted Section 6(b)(1) to be inapplicable to FOIA requests. Representative Moss then remarked, "As the primary author of both acts, I am inclined to agree with you." *Regulatory Reform—Volume IV: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 7-8 (1976).[18]

[17] The court of appeals noted that the Conference Report (H.R. Conf. Rep. No. 92-1593, 92d Cong., 2d Sess. 41 (1972)) discussed "in almost the same breath" (Pet. App. 53a) the requirements of Section 6(b)(1) and 6(a)(1), which preserves the statutory exemptions in the FOIA (5 U.S.C. 552(b)) for information obtained under the Consumer Product Safety Act (see 15 U.S.C. 2055(a)(1)). The fact that the Conference Report discussed these provisions together, however, hardly suggests that FOIA requests are subject to Section 6(b)(1), as the court of appeals assumed (Pet. App. 53a). The Conference Committee merely described the separate functions that the two sections perform. Perhaps more important, the language of the provisions is unchanged from the House bill that is explained more fully in the House Report discussed in the text.

[18] The court of appeals rejected this evidence of congressional intent, in part because "'[t]he remarks of a single

Thereafter, in enacting the Consumer Product Safety Commission Improvements Act of 1976, Congress addressed the question of the proper scope of Section 6(b)(1) and ratified the Commission's interpretation of that provision. In the 1976 legislation, Congress added Section 29(e) to the original Act to "prescribe[] conditions under which the Commission may provide accident and investigation reports to other Federal agencies or State or local authorities engaged in activities relating to health, safety, or

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legislator, even the sponsor, are not controlling in analyzing legislative history'" (Pet. App. 58a), quoting *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979). We do not contend that Representative Moss' understanding is controlling, although we do suggest that it is entitled to great weight in interpreting the language of the statute that he authored. See *Chrysler Corp.* v. *Brown*, *supra*, 441 U.S. at 311; *Simpson* v. *United States*, 435 U.S. 6, 13 (1978); *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, 394-395 (1951).

The court below also found Representative Moss' interpretation of the Act to be of little probative value because "a proposed amendment to section 6(b)(2) that would have added the release of information by the Commission under the FOIA to the list of exceptions from the requirements of section 6(b)(1) * * * has never been reported out of committee" (Pet. App. 58a). But courts may not "draw the inference * * * that an agency admits that it is acting upon a wrong construction by seeking ratification by Congress. Public policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations." *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47 (1950). Accord, *American Trucking Ass'ns* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416-418 (1967). The failure to enact new legislation may suggest only that Congress, like the Commission, does not regard Section 6(b)(1) as applicable to FOIA requests and that an amendment is therefore unnecessary.

consumer protection." H.R. Conf. Rep. No. 94-1022, 94th Cong., 2d Sess. 26 (1976). See page 17, *supra*. In permitting the Commission to release certain information to these other government agencies, Congress prohibited the recipient agencies from disclosing "to the public any information contained in a report received [from the Commission] * * * unless with respect to such information the Commission has complied with the applicable requirements of section 6(b)" of the Act. Pub. L. No. 94-284, Section 15, 90 Stat. 510, adding Section 29(e) to the Consumer Product Safety Act, 15 U.S.C. 2078(e). Because the new Section 29(e) incorporates the requirements of Section 6(b) by reference, the Conference Committee explained the joint operation of the two provisions (H.R. Conf. Rep. No. 94-1022, *supra*, at 27 (emphasis supplied)):[19]

> The requirement that the Commission comply with section 6(b) prior to another Federal agency's public disclosure of information obtained under the Act is not intended by the conferees to

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[19] The court of appeals gave little weight to the Conference Committee Report, in part because the Committee's interpretation of Section 29(e) is not discussed anywhere else in the legislative history (Pet. App. 56a). But the fact that the explanation of Section 29(e) contained in the Conference Committee Report is not discussed or contradicted elsewhere in the legislative history is hardly grounds for rejecting the Committee's explanation. Conference Committee reports often contain detailed discussion of provisions not regarded as controversial in preceding debates, particularly where (as here) the provision at issue was not contained in the draft bill in one of the Houses (see Pet. App. 56a).

supersede or conflict with the requirements of the Freedom of Information Act (5 U.S.C. 552 (a)(3) and (a)(6)). *The former relates to public disclosure initiated by the Federal agency while the latter relates to disclosure initiated by a specific request from a member of the public under the Freedom of Information Act.*

This Court should not reject the Commission's long-standing interpretation of Section 6(b)(1), which Congress ratified in enacting Section 29(e). The Commission has consistently construed Section 6(b)(1) to apply only to agency-generated disseminations of product safety information and not to FOIA disclosures. This view is formalized in proposed Commission regulations. 42 Fed. Reg. 54304 *et seq.* (1977). An agency's interpretation of its own enabling legislation should not be overturned unless there are "compelling indications" that the interpretation is wrong. See, *e.g.*, *Miller* v. *Youakim*, 440 U.S. 125, 143-144 (1979); *Zenith Radio Corp* v. *United States*, 437 U.S. 443, 450-451 (1978). This is particularly so where, as here, the agency's interpretation is a "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933), quoted in *Zenith Radio Corp.* v. *United States*, *supra*, 437 U.S. at 450.

The Court should be especially reluctant to set aside the Commission's view in this case because Congress

"has revisited the Act and left the [agency] practice untouched." *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974). As the Court recently remarked in *United States* v. *Rutherford*, No. 78-605 (June 18, 1979), slip op. 8-9 & n.10, "once an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." Accord, *Andrus* v. *Allard*, No. 78-740 (Nov. 27, 1979), slip op. 6; *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978). Here, of course, Congress not only has not altered "the agency's interpretation * * * [but has enacted] subsequent legislation declaring the intent of an earlier statute * * *." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

When an act of Congress is amended, "[t]he original section as amended and the unaltered sections of the act * * * relating to the same subject matter, are to be read together. The act * * * should be construed as to future events as if it had been originally enacted in that form." 1A C. Sands, *Sutherland Statutory Construction* § 22.35, at 197 (4th ed. 1972) (footnotes omitted). At the time Congress added Section 29(e) to the Act in 1976, it made clear its intent that Section 6(b)(1), which is incorporated by reference in the new provision, should apply only to public disclosure "initiated by the [Commission]" and is inapplicable to information obtained from the Commission by other agencies and the public under the

Freedom of Information Act. H.R. Conf. Rep. No. 94-1022, *supra*, at 27. In order for the amended and unamended provisions of the Act to have a "meaning * * * consistent with each other" (*Blair* v. *Chicago*, 201 U.S. 400, 469 (1906)), Section 6(b) must be understood to have the meaning ascribed to it by Congress in enacting Section 29(e).[20] Indeed, if the information involved in this case had been given to another federal agency under Section 29(e), the Conference Committee Report makes clear that the other agency would be required to disclose the information in the event of a FOIA request (subject, of course, to possible FOIA exemptions) without any need for compliance by the disclosing agency or the Commission with Section 6(b)(1). Under respondents' interpretation of the Act, however, the Commission itself would be forced to satisfy Section 6(b)(1) before complying with the identical FOIA request. Section 6(b)(1) should not be interpreted to create such an inconsistency in the statutory scheme.

In sum, every reference point in the interpretive process—the "overall structure of the Act, Congress' statements of purpose and policy, the legislative history, and the text of" Section 6 (*Board of Education* v. *Harris*, No. 78-873 (Nov. 28, 1979), slip op. 10)—supports the conclusion that Section 6(b)(1) of the Consumer Product Safety Act does not apply to information disclosed by the Commission pursuant to a request under the Freedom of Information Act.

[20] The court of appeals thought that this principle is inapposite here because "section 29(e), by its terms, does not interpret the scope of section 6(b)" (Pet. App. 55a). This is incorrect. By incorporating Section 6(b) by reference into Section 29(e), the proper meaning of Section 29(e) necessarily turns pro tanto on the meaning of Section 6(b). Thus, in adopting Section 29(e), Congress necessarily "interpret[ed] the scope of section 6(b)" (Pet. App. 55a) in order to establish the meaning of the new provision.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-521

CONSUMER PRODUCT SAFETY COMMISSION, *et al.*,
Petitioners,

v.

GTE SYLVANIA, INCORPORATED, RCA CORPORATION, THE MAGNAVOX COMPANY, ZENITH RADIO CORPORATION, MOTOROLA, INC., WARWICK ELECTRONICS, INC., FORD AEROSPACE & COMMUNICATIONS CORPORATION, MATSUSHITA ELECTRIC CORPORATION OF AMERICA, SHARP ELECTRONICS CORPORATION, TOSHIBA-AMERICA, INC., GENERAL ELECTRIC COMPANY, and ADMIRAL CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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IN THE

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OCTOBER TERM, 1979

No. 79-521

CONSUMER PRODUCT SAFETY COMMISSION, *et al.*,

Petitioners,

v.

GTE SYLVANIA, INCORPORATED, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS

QUESTION PRESENTED

Did the Court of Appeals correctly affirm entry of an injunction restraining the Consumer Product Safety Commission from publicly disclosing information furnished to it by respondent manufacturers in confidence in response to its own information demands, when the identity of the manufacturers "may be readily ascertained" and the CPSC admittedly failed to "take reasonable steps to assure" that the information was "accurate" and that disclosure would be "fair in the circumstances and reasonably related to effectuating the purposes of [the Consumer Product Safety Act]" as required by Section 6(b)(1) of the Act?

STATUTE INVOLVED

Section 6(b)(1) of the Consumer Product Safety Act, 15 U. S. C. § 2055(b)(1), provides in relevant part:

> "The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of [a] manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of [the Act]."

STATEMENT

This case involves the decision of the Consumer Product Safety Commission ("CPSC") to disclose to the public certain admittedly inaccurate, unverified, and misleading information identifying specific manufacturers (the respondents here) that had been submitted by the manufacturers under claims of confidentiality in order to comply with special orders and subpoenas issued by the CPSC. The question presented is whether the public disclosure by the CPSC of the information in response to requests under the Freedom of Information Act ("FOIA"), 5 U. S. C. § 552, should be permitted when Section 6(b)(1) of the Consumer Product Safety Act ("CPSA"), 15 U. S. C. § 2055(b)(1), concededly would preclude any public disclosure of the same information if "initiated" by the CPSC.

The Gathering of the Information

In early 1974, the CPSC began to investigate possible hazards associated with television receivers and to consider whether there was a need for developing safety

standards. 39 Fed. Reg. 10,929 (1974).[1] The public notice initiating the investigation requested television manufacturers to submit to the CPSC all "TV-related accident" reports collected by them since hearings held in 1969 by the National Commission on Product Safety. *Id.* at 10,930.

After reviewing the materials voluntarily submitted in response to the public notice, the CPSC decided to use compulsory procedures to obtain additional information. On May 13, 1974, the CPSC directed special orders to twenty-five television manufacturers, and on July 26, 1974 issued subpoenas to sixteen manufacturers (including the twelve respondents), calling for the submission of the same information as had been requested in the public notice and some additional information as well (A. 94-95, 96-97; *see, e.g.*, A. 36-37, 41-43).[2]

The manufacturers' responsive submissions were accompanied by claims that the "TV-related accident" information was proprietary and not ordinarily disclosed to anyone and that it should be given confidential treatment by the CPSC (A. 96, 98; *see, e.g.*, A. 55-63). The manufacturers also stated that any disclosure of the information identifying particular manufacturers would be grossly misleading because "accident" figures are meaningful only when considered in light of the number of each manufacturer's sets in use and the varying incident reporting systems used by the manufacturers in preparing their submissions (*see, e.g.*, A. 181, 183).

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1. Five years later, after a thorough review of the safety of television receivers, the CPSC found that no standards were necessary and terminated its investigation. 44 Fed. Reg. 44,206 (1979).

2. "A." refers to the Appendix to the Briefs in this Court and "Pet. App." to the Appendix to the Petition for Certiorari.

From the outset, compliance with the CPSC's information requests was impeded by the agency's repeated refusal to define the term "TV-related accident" (*see, e.g.*, A. 102-03, 227, 228), a term for which there has never been any generally accepted industry definition (A. 97 n. 19, 205 ¶ 3). However, despite warnings that the vagueness of its requests inevitably would result in confusion (*see, e.g.*, A. 181, 300), the CPSC made no attempt to clarify them.

As was predicted, the failure of the CPSC to define "TV-related accident" resulted in greatly varying submissions, with some manufacturers applying much more restrictive definitions to the term than others (A. 221, 238).[3] For example, some manufacturers supplied data concerning alleged "fire" or "smoke" incidents only, whereas others also submitted reports of alleged incidents involving implosion (collapse of the television picture tube), shock, excessively high voltage, mechanical failure, and the like (A. 103, 184 ¶ 14, 214 ¶ 4, 221, 248). Some manufacturers furnished data only for alleged incidents involving personal injury or damage to property external to the television set, whereas others submitted reports for alleged incidents involving damage whether or not it extended beyond the sets themselves (*see, e.g.*, A. 206 ¶ 6, 209 ¶ 12, 214 ¶ 4). Finally, some manufacturers limited

3. Even after reviewing the manufacturers' submissions, the CPSC did not attempt to make them more comparable by reaching some reasonable definition of the term "TV-related accident" and discarding the reported incidents that did not come within that definition. Instead, the CPSC included in its view of what constituted a "TV-related accident" such far-fetched occurrences as a fire caused by a burning candle sitting on top of a television set (A. 254), a hernia sustained while carrying a television set (A. 231), and the situation where a television watcher's cigarette fell in the cushioning of a chair and started a fire that spread and caused the television to catch on fire (A. 253).

their submissions to data on alleged incidents involving television sets manufactured after 1969, whereas others reported on alleged incidents that came to their attention within the relevant period without regard to the date of manufacture of the set (*see, e.g.*, A. 185 ¶ 16, 206 ¶ 6, 214 ¶ 4).[4]

The CPSC recognized that there were differences in the various manufacturers' record-gathering and retention systems and also that some submissions were "inadequate" or "marginal" (A. 217). However, it made no attempt to secure more uniform compliance with its subpoenas because it saw no need for better information; in its view "sufficient information [had] been collectively submitted by the sixteen manufacturers to significantly facilitate the Commission's regulatory development activities for TV receivers" (A. 217).

Compounding the unreliability of the submitted information as a whole and the impossibility of drawing meaningful comparisons among the manufacturers was the fact that the CPSC required submission of all reports of "TV-related accidents" without regard to whether the reports were verified or not. Indeed, the sample data forms accompanying the subpoenas explicitly acknowledged that "in many cases" the data would be "incomplete, unverified and even incorrect" (A. 98; *see, e.g.*, A. 45). Accordingly, many of the reports submitted emanated from second and third hand sources whose reliability was completely untested (A. 255; *see, e.g.*, A. 184 ¶ 13, 207

4. The differences in the definitions used by the manufacturers had a significant effect on the number of incidents reported. For example, had one of the respondent manufacturers reported only incidents involving sets manufactured since 1969, it would have reported only 10% of the incidents it actually did report (A. 185 ¶ 16).

¶ 7). Nevertheless, the CPSC took no steps to determine whether any of the alleged "TV-related accidents" referred to in the submissions were in reality caused by the television sets involved, or, indeed, whether the "accidents" had actually occurred at all (A. 277, 292, 296), other than to investigate perhaps as few as ten and in any event no more than 100 of the 7,620 reported incidents (A. 236).

After reviewing the submissions, the CPSC had the information computerized and prepared a printout listing for each manufacturer and cataloging by type the alleged incidents that it had reported (A. 98, 244-46).[5] The resulting printout is titled "TV Accident Reports" (A. 249) and does not indicate that something other than a television set may have been the cause of any of the listed "accidents" (A. 254, 267). Nor does it indicate that some (indeed, most) of the reports from which the printout was compiled have never been verified (A. 247, 249, 254-55, 287). The printout thus not only is characterized by the same defects as the underlying data but also adds to the problem by "creat[ing] an impression of accuracy" (A. 120 n. 87).

The many defects in the submitted "TV-related accident" information led both the CPSC's consultant and its project director to conclude that comparisons among the manufacturers on the basis of the information would not be proper and that disclosure of the information would not aid the public in making safety comparisons or serve any other useful purpose (A. 152, 240-41, 256-57, 268, 288).

5. One of the purposes of creating the printout was the "thought that it might be made available to freedom of information requesters" (A. 226; *see* A. 217-18, 152-54).

The CPSC's Decision To Disclose the Information

On June 14, 1974, Consumers Union of the United States, Inc. and Public Citizens' Health Research Group ("the requesters") submitted formal FOIA requests for the information that had been supplied in response to the CPSC's special orders (A. 136-37, 138-40).[6] The manufacturers, who were informed of the requests by letters dated August 2, 1974 (*see, e.g.*, A. 49-50), responded by reasserting the confidentiality of their submissions (*see, e.g.*, A. 55-64).

On March 28, 1975, the CPSC decided to release both the basic "TV-related accident" information that had been submitted pursuant to its special orders and subpoenas and the computer printout, despite the numerous defects in the data supplied and the printout (A. 132 ¶ 19). Letters dated April 7 and 8, 1975 notifying the manufacturers of this determination (*see, e.g.*, A. 65-66) were accompanied by copies of a memorandum dated March 21, 1975 prepared by Edward J. Cull, an attorney in the CPSC's Office of General Counsel ("the Cull Memorandum") (A. 67-76), which the CPSC said "formed the basis" for its decision to disclose the material (*see, e.g.*, A. 66; *see also* A. 132 ¶ 19). The Cull Memorandum "recognized that some television manufacturers have apparently been more conscientious in compiling accident data than others and thus, the release of the accident data might be misleading in some cases" and recommended that the CPSC offer to accompany the release of the data with a statement reflecting this fact (A. 75-76). On the other hand, the Cull Memorandum concluded that the information was not exempt from disclosure under the

6. The FOIA requests were later extended by the CPSC to cover the information submitted in response to the subpoenas as well (A. 153, 159; *see* A. 129 ¶ 12).

FOIA as confidential commercial information, and that even if the information were so exempt it should be disclosed because "[t]he release of the accident data would assist consumers to better evaluate the safety of TVs" (A. 73; *see also* A. 134 ¶ 29).

District Court Proceedings

Upon being advised that the CPSC had decided to disclose their "TV-related accident" submissions to the public, the twelve respondents promptly brought suit in various federal judicial districts [7] against the CPSC seeking to enjoin the disclosure. Temporary restraining orders prohibiting the disclosure of the information *pendente lite* were entered (*see, e.g.*, A. 78-79), and the actions were eventually consolidated before Chief Judge Latchum of the United States District Court for the District of Delaware (A. 80), where the majority of them had been brought.

On October 23, 1975, after discovery and extensive briefing and oral argument, Judge Latchum preliminarily enjoined the CPSC from disclosing the requested information (A. 89-91) on the ground that the CPSC had failed to comply with Section 6(b)(1) of the CPSA.[8] **GTE Sylvania, Inc. v. CPSC,** 404 F. Supp. 352 (D. Del. 1975) (A. 92-124). Judge Latchum held that Section 6(b)(1) imposes three "affirmative obligations" that "cannot flippantly be avoided" but must be fulfilled before the CPSC may publicly disclose, pursuant to the FOIA or otherwise, information from which the identity of a manufacturer can be readily ascertained (A. 116); that "[f]ailure to comply with any one of the standards means that disclosure would be improper" (A. 115); and that none of the standards had been met here. Thus, the District Court concluded that:

1. The CPSC had failed to take "reasonable steps to assure" that the information it proposed to release was "accurate" because the CPSC had "demand[ed] submission of inaccurate [unverified] data" (A. 117-18), had "refused to take any steps to ameliorate the situation" caused by the ambiguities in its information requests (A. 118), and had failed to seek full compliance with its subpoenas "to remedy the incomplete responses of some manufacturers" (A. 118).

2. Disclosure would not be "fair in the circumstances" since the information "could unjustifiably damage the manufacturers because the data does not form a reliable foundation for safety comparison —the only contemporaneous reason given by the Commission for the release of the information" (A. 120) (footnote omitted). In fact, "the public would be misled" by the information, all the more so because release of information by the government "carries with it an aura of authenticity which cannot be ignored" and because the computer printout "creates an impression of accuracy" that "aggravate[s] the problem" (A. 120 & n. 87).

7. The following manufacturers filed actions in the District of Delaware: GTE Sylvania (No. 75-104), RCA (No. 75-108), Magnavox (No. 75-112), Zenith (No. 75-113), Motorola (No. 75-114), Warwick (No. 75-115), and Ford (formerly Philco Ford) (No. 75-116). Matsushita (No. 75-2040), Sharp (No. 75-2049), and Toshiba (No. 75-2050) filed in the Southern District of New York, General Electric in the Northern District of New York (75-CV-189), and Admiral in the Western District of Pennsylvania (No. 75-531).

8. Judge Latchum did not rule on the applicability of the Trade Secrets Act, 18 U. S. C. § 1905, or Section 6(a)(2) of the CPSA, 15 U. S. C. § 2055(a)(2), both of which had also been asserted by the manufacturers as bases for enjoining disclosure.

3. "[I]t is clear that the materials which the Commission proposes to disclose cannot aid consumers in determining which television manufacturer has the safest product, and therefore would not be 'reasonably related to effectuating the purpose of [the CPSA]'" (A. 121).

The preliminary injunction remained in effect until December 8, 1977, when, after further briefing and argument, Judge Latchum granted the manufacturers' motions for summary judgment and entered a permanent injunction. **GTE Sylvania, Inc. v. CPSC,** 443 F. Supp. 1152 (D. Del. 1977) (Pet. App. 77a-104a). In issuing the permanent injunction, Judge Latchum noted that "the undisputed facts upon which the Court based its earlier decision [had] not changed" and that the CPSC still had not complied with Section 6(b)(1) (Pet. App. 79a).[9]

Affirmance by the Court of Appeals for the Third Circuit

On April 30, 1979, a panel of the United States Court of Appeals for the Third Circuit (Seitz, Chief Judge, and Gibbons and Higginbotham, Circuit Judges) affirmed Judge Latchum's permanent injunction in its entirety. **GTE Sylvania, Inc. v. CPSC,** 598 F. 2d 790 (3d Cir. 1979) (Pet. App. 1a-70a).

In an extensive opinion by Chief Judge Seitz, the unanimous panel noted that the CPSC had not challenged

9. On December 22, 1977, Judge Latchum denied the CPSC's motion to alter or amend the judgment to permit the disclosure of the information if the agency did comply with Section 6(b)(1) (A. 174-75), noting once again that the CPSC had made no showing of "its ability and willingness to take reasonable steps to assure the accuracy of the unverified material gathered in 1974 and to satisfy the other requirements of Section 6(b)(1)" (A. 175).

on appeal Judge Latchum's determination that the disclosure of the misleading, inaccurate, and unverified information it had demanded from the manufacturers would not satisfy the requirements of Section 6(b)(1) of the CPSA because the CPSC had failed to "take reasonable steps" to assure the accuracy, fairness, and relevance to the CPSA's purposes of the information (*see* Pet. App. 26a-27a). The Court of Appeals then held that compliance with Section 6(b)(1) was required here since the provision was clearly designed to "protect manufacturers from the harmful effects of inaccurate or misleading public disclosure by the Commission, through any means," whether in response to the FOIA or otherwise, of information "obtained pursuant to [the] broad information-gathering powers" uniquely afforded the agency by the CPSA (Pet. App. 59a).[10]

10. In reaching this conclusion, the Court of Appeals rejected the reasoning and holding of **Pierce & Stevens Chem. Corp. v. CPSC,** 585 F. 2d 1382 (2d Cir. 1978), which had approved the CPSC's narrow reading of Section 6(b)(1) to exclude from that provision's mandate disclosures in response to FOIA requests.

SUMMARY OF ARGUMENT

Section 6(b)(1) of the CPSA requires that, before publicly disclosing information obtained pursuant to the Act from which the identity of a manufacturer "may be readily ascertained," the CPSC "shall take reasonable steps to assure" that the information "is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of [the Act]." 15 U. S. C. § 2055(b)(1).

In this case the CPSC used its broad information-gathering powers under the CPSA to obtain highly confidential proprietary information from the manufacturers and then decided to disclose to the public not only the underlying information but also a computer printout prepared from it, both of which clearly identify the manufacturers. The CPSC concedes that the information it proposes to disclose is inaccurate and would be misleading to the public. Moreover, it does not dispute the District Court's determination that disclosure "could unjustifiably damage the manufacturers because the data does not form a reliable foundation for safety comparison" (*see* Pet. App. 27a, *quoting* A. 120).

The CPSC has defended its decision to disclose the information despite its failure to follow the Section 6(b)(1) procedures by arguing both here and in the courts below that it is required to comply with this provision with regard only to what it terms "affirmative" disclosures of information, *i.e.*, disclosures that it "initiates." Thus the CPSC would have this Court hold that it is completely free to disclose the admittedly inaccurate and misleading information involved here so long as it does so in response to a request pursuant to the FOIA.

Contrary to the impression that the CPSC seeks to create, there is no meaningful distinction between so-called "affirmative" disclosures "initiated" by the agency and "passive" disclosures in response to FOIA requests. The artificiality of the distinction is graphically demonstrated by this case, where the CPSC in effect created the defects in the information and yet determined to release it even if disclosure were not mandated by the FOIA. The fact that the requesters are "consumer groups" undoubtedly planning no less widespread dissemination of the information than the agency itself would undertake is a further indication of the total lack of merit in the CPSC's position. Further, the argument that FOIA disclosures do not involve any CPSC "endorsement" ignores both the language of Section 6(b)(1) and the fact that as a practical matter the public necessarily will give more credence to information when it comes from the government by whatever means.

Neither the language nor the contemporaneous legislative history of Section 6(b)(1) supports the illogical distinction that is said to exist between public disclosure of information "initiated" by the CPSC and public disclosure of the very same information in response to an FOIA request. Quite to the contrary, the language of the CPSA plainly indicates that disclosures in response to FOIA requests are "public disclosures" within the meaning of Section 6(b)(1), and the FOIA itself confirms this. Similarly, the history of the CPSA's enactment reflects a clear Congressional concern about the harm that would be done by *any* public disclosure of inaccurate or misleading information identifying particular manufacturers.

The CPSC and *amicus curiae* Consumer Federation of America ("CFA") [11] argue at length that the agency's

11. CFA also participated as *amicus* in support of the CPSC's position in the Court of Appeals (*see* Pet. App. 27a).

reading of Section 6(b)(1) is necessary in order to avoid a conflict between that provision and the FOIA. But nothing in the FOIA requires Section 6(b)(1) to be inapplicable to disclosures made in response to FOIA requests. Obviously, there is an inconsistency between the philosophy of a specific non-disclosure statute prohibiting release of information and the general pro-disclosure objective of the FOIA. However, Exemption 3 of the FOIA, 5 U. S. C. § 552(b)(3), is designed to allow the specific non-disclosure statute to control, as indeed it must in order to carry out the Congressional intent in enacting it. Here the Congressional concern about unfair harm to manufacturers' reputations that gave rise to the enactment of Section 6(b)(1) clearly outweighs the more general policies of the FOIA. In any event, the inconsistencies alleged to exist between the procedures established by the FOIA and those of Section 6(b)(1) are completely contrived, and the CPSC's complaint that the decision below will impose an undue administrative burden upon it is both speculative and unrealistic.

The two additional arguments raised by the CPSC are equally without merit. The Congressional intent in enacting Section 6(b)(1) is directly contrary to the CPSC's so-called "administrative interpretation" (adopted only after commencement of this litigation) that the statute does not apply when there has been an FOIA request for the information involved. The other assertion, that the CPSC's erroneous "interpretation" was later approved by Congress, is no more tenable, since Section 6(b)(1) has never been amended and there has been no subsequent legislation declaring the intent of the 1972 Congress in initially enacting it.

ARGUMENT

THE CONSUMER PRODUCT SAFETY COMMISSION WAS PROPERLY ENJOINED FROM PUBLICLY DISCLOSING INACCURATE AND MISLEADING INFORMATION IDENTIFYING THE RESPONDENT MANUFACTURERS SINCE IT FAILED TO COMPLY WITH THE THREE REQUIREMENTS OF SECTION 6(b)(1) OF THE CONSUMER PRODUCT SAFETY ACT.

I.

As This Case Shows, There Is No Logical Distinction Between Disclosures of Information "Initiated" by the CPSC and Disclosures in Response to FOIA Requests.

The position of the CPSC in this litigation hinges on its oft-repeated, but totally unsubstantiated, assertion that there is some undefined difference between so-called "affirmative" disclosures of information "initiated" by the CPSC, on the one hand, and mere compliance with an FOIA request, on the other. As the facts of this case clearly demonstrate, no meaningful distinction exists between these two types of public disclosures. Moreover, the CPSC's position ignores the practical reality that the disclosure of information to an FOIA requester who is completely free to broadcast that information as widely as it chooses can have exactly the same effect as a so-called "affirmative" disclosure of the information "initiated" by the CPSC.

A. The CPSC May Not Disclaim Responsibility for the Disclosure of Inaccurate and Misleading Information That It Voluntarily Determined First To Collect and Then To Release.

This case effectively illustrates the error of the CPSC's claim that any disclosure of information in response to an FOIA request is "passive" or involuntary. Not only did the CPSC determine to collect inaccurate and misleading information here when it knew that that information was the subject of FOIA requests, but it also determined to disclose the information whether or not the FOIA required disclosure.

A crucial finding made by the District Court (*see* A. 118-19) and relied on by the Court of Appeals (*see* Pet. App. 68a) is that the CPSC was directly responsible for the inaccuracy and the misleading nature of the information obtained from the manufacturers. The general unreliability of the unverified hearsay information that the CPSC demanded was fully recognized by the CPSC engineer (A. 225, 296) who served as project director for the investigation (A. 97 n. 18). Moreover, the agency was forewarned of the inevitable consequences of its failure to define the term "TV-related accident" (A. 299-301) and was well aware of the wide differences among the submissions of the various manufacturers that made them noncomparable (A. 238, 248, 256-57, 259, 290-91). Accordingly, the defects in the data were largely created by the CPSC and cannot be shrugged off by its suggestion that it merely responded to FOIA requests passively and involuntarily.

Highlighting the active role played by the CPSC here is the fact that the initial FOIA requests for the information (A. 136-40) were made more than a month *before* the

agency issued the subpoenas pursuant to which the bulk of the information was submitted (A. 100 n. 29, 286). Many of the problems in the CPSC's information collection processes came to light between the time of the initial requests (which the agency extended to include the responses to the subpoenas as well as to the special orders (A. 153, 159; *see* A. 129 ¶ 12)) and the date of issuance of the subpoenas. Yet the CPSC did nothing to cure these problems. The agency acted only to smooth the way for the eventual release of the information pursuant to the FOIA, even going so far as to computerize the information at least, in part for that purpose (*see* p. 6 n. 5, *supra*).

Indeed, despite all of the acknowledged defects in the information, the CPSC, as a discretionary matter, made a deliberate determination to disclose it to the public in a form that would identify the manufacturers. That determination cannot be squared with the CPSC's assertion before this Court that the question whether Section 6(b)(1) of the CPSA applies to disclosures in response to FOIA requests "must be resolved on the assumption that . . . the Commission, like any other federal agency, has no choice but to comply with a FOIA request" (CPSC Brief at 22 n. 7). In fact, the CPSC has made a general policy decision to exercise the widest possible discretion in favor of disclosing material responsive to FOIA requests even when it need not do so.[12] That policy is evident in the

12. During a 1976 oversight hearing, Richard O. Simpson, then Chairman of the CPSC, reported that the agency had adopted an "extremely liberal interpretation" of the FOIA, one requiring "release of all material requested, notwithstanding the available withholding exemptions" granting the agency discretion to deny a request. Regulatory Reform: Hearings Before the Subcomm. on Oversight & Investigations of the House Comm. on Interstate & Foreign Commerce, 94th Cong., 2d Sess., Vol. IV at 7 (1976) ("Oversight Hearings"). The CPSC's formal regulations expressly adopt this policy as well. *See* 16 C. F. R. § 1015.15(b).

CPSC's determination that the information involved here should be disclosed and cuts strongly against any argument that the agency "has no choice" but is required to disclose the information by the FOIA.

It is clear that the CPSC made a discretionary decision to disclose the information to the public and did not just passively agree to make it available to the requesters pursuant to the FOIA. The Cull Memorandum that "formed the basis for the Commission's decision" (A. 66) to disclose the information asserted that, even if the information were exempt from compulsory disclosure pursuant to the FOIA, it should be released "to the public" (*not* "to the requesters") because its disclosure would effectuate one of the purposes of the CPSA by "assist[ing] consumers to better evaluate the safety of TVs" (A. 73). Even Constance B. Newman, then Vice Chairman of the CPSC, later stated (in an affidavit seeking to support the CPSC's motion for summary judgment) that "the Commission decided to release the accident information in an effort to comply with the intent of the Freedom of Information Act *and to further the public interest*" and that "[t]he Commission believed that disclosure of the information would serve the important purpose of informing the public" (A. 134 ¶ 29) (emphasis added).

Of course, the CPSC's assertions that release of the information would aid the public in evaluating the safety of television sets are directly contradicted by the admissions of the people at the CPSC most knowledgeable about it (the CPSC's project director (A. 240-41, 268, 288) and its consultant (A. 152, 256-57)) that comparison among manufacturers on the basis of the collected information would *not* be proper and would *not* aid in making safety comparisons or serve any other useful purpose.

Significantly, the CPSC does not, and cannot, challenge Judge Latchum's finding that disclosure of the information would not further the purposes of the CPSA (*see* A. 121). Thus it is not disputed that, but for the FOIA requests, Section 6(b)(1) would prevent the CPSC from disclosing the information (*see* Pet. App. 26a). Nevertheless, the CPSC determined that the information should be released to the public. That decision, like the initial decision to collect the information, simply cannot be reconciled with the CPSC's argument that it was compelled to release the information in order to fulfill what it perceives as its obligations under the FOIA.

B. The CPSC's Disclosure of Information to an FOIA Requester Can Accomplish Exactly the Same Harm as a Disclosure "Initiated" by the Agency.

As we demonstrate below (*see* pp. 28-35, *infra*), Section 6(b)(1) was enacted to protect manufacturers from the harm that might result from disclosure by the CPSC of inaccurate or misleading information about them. That protection is equally necessary whether disclosure is made via a press release or in response to an FOIA request, because the harm that could be done is precisely the same. The argument that only disclosures "initiated" by the CPSC carry the agency's "endorsement" (*see* CPSC Brief at 20) is not supported by Section 6(b)(1) and ignores the fact recognized by the District Court that *any* release of information by the government automatically "carries with it an aura of authenticity" (A. 120 n. 87).

It cannot be denied that even a single FOIA requester is a member of the "public" (*see* pp. 24-25, *infra*). Moreover, as noted by the Court of Appeals, the CPSC "[has] no control over the use to which [the information] might be put by the requesters" (Pet. App. 68a). Since a re-

quester is free to broadcast widely any information it obtains, disclosure easily can extend far beyond the requester to the world at large. Nor are requesters limited to individuals; they often are "consumer groups" like the requesters here.

In fact, the FOIA was enacted with the expectation that the press would be its major user, and the statute was designed to give the press access to information contained in government files so that it could pass this information on to the general public.[13] As Professor Ernest Gellhorn notes, this widespread broadcast of information received pursuant to an FOIA request is the logical equivalent of publicity undertaken by the agency itself:

> "When media coverage closely follows agency activities, affirmative publicity measures [by the agency] may be unnecessary because mere freedom of public access to information performs the same function . . . . In such a case, the issues involved in the Freedom of Information Act cannot be disentangled from adverse publicity issues." [14]

The capacity for widespread broadcast of a disclosure made in response to an FOIA request is vividly illustrated by the present case. As noted by the Court of Appeals, one of the requesters here is the publisher of *Consumer Reports* and disclosure to that requester alone "may have widespread adverse effects on [the manufacturers'] business reputations" (Pet. App. 68a-69a n. 6). The damage would be at least as great as the harm that would result from the disclosure of the information by a so-called "affirmative" press release "initiated" by the CPSC. Indeed, it is hard to imagine that any significant harm would be done by the government's disclosure of information in most cases were it not for the media's coverage of that disclosure.[15]

13. *See, e.g.*, 112 Cong. Rec. 13,642 (1966) (remarks of Rep. Moss); *id.* at 13,648 (remarks of Rep. Pucinski). The press not only championed the legislation that resulted in the FOIA but played a major role in its enactment. *See, e.g.*, 112 Cong. Rec. 13,652 (1966) (remarks of Rep. Shriver); *id.* at 13,642-43 (remarks of Rep. Moss); H. R. Rep. No. 1497, 89th Cong., 2d Sess. 2-3 (1966).

14. Gellhorn, **Adverse Publicity by Administrative Agencies,** 86 Harv. L. Rev. 1380, 1422 n. 164 (1973).

The CPSC claims that Section 6(b)(1) is brought into play only for so-called "affirmative" disclosures because it is only these disclosures that bear the agency's "endorsement" or "official 'seal of approval' " (CPSC Brief at 20, 21; *see also* CFA Brief at 15-16). Surely this is not correct, for it would permit the CPSC to disclose inaccurate or misleading information identifying a manufacturer any time it wished merely by issuing an accompanying statement that it was not vouching for or "endorsing" the accuracy of the information. Even the CPSC does not argue that Section 6(b)(1) may be circumvented in that way. Nowhere is there any indication that the provision is applicable only where the information to be disclosed has the agency's "endorsement."

15. This fact was noted in the legislative history of the CPSA, where Representative Crane cited the damage to duPont's reputation resulting from the FTC's erroneous charges concerning Zerex antifreeze as a reason why the CPSC should not even be created. 118 Cong. Rec. 31,389 (1972) (quoted in CPSC Brief at 35 n. 14). Even though the FTC dropped the charges a year later, news coverage of the retraction paled in comparison to the earlier publicity, and in any event "[t]he financial damage had, of course, already been done." *Id.*

Two other examples of the disastrous effects of the media's coverage of precipitous releases of inaccurate information by the government are the 1959 cranberry scare and the 1977 alarm concerning botulism in green beans canned by Stokely-Van Camp. *See* Gellhorn, **Adverse Publicity,** *supra,* 86 Harv. L. Rev. at 1408-09, 1415 n. 142.

In fact, *any* purported product safety information coming from the files of an agency charged with detecting safety hazards carries with it an aura of accuracy. Rightly or wrongly, the public will give more credence to information simply because it comes from the government.[16] This is particularly true where, as here, the information does not just happen to be in the agency's files but was submitted by the very businesses involved in response to the agency's demands.[17] The perception of reliability is further heightened when the information that has been disclosed is then broadcast by "consumer groups" like the requesters here.

* * *

In sum, there is no rational way to distinguish between so-called "affirmative" and "passive" disclosures of information by the CPSC. That being the case, logic requires that Section 6(b)(1) apply to *all* public disclosures of information identifying specific manufacturers, no matter how "initiated."

II.

The Statutory Language Leaves No Room for Doubt That Section 6(b)(1) of the CPSA Applies to All Public Disclosures of Information by the CPSC, Including Disclosures in Response to FOIA Requests.

Nothing in the language of Section 6(b)(1) supports the CPSC's disingenuous argument that the provision's

16. For example, while the FBI might maintain that its "raw files" do not have the agency's imprimatur as to accuracy, the information in these files once released by the FBI would undoubtedly receive a certain amount of public acceptance.

17. This fact alone distinguishes the instant case from the situation involved in **Pierce & Stevens Chem. Corp. v. CPSC**, 585 F. 2d 1382 (2d Cir. 1978), a case relied upon by the CPSC in its Petition for Certiorari and cited in its Brief on the merits.

protection against public disclosure of inaccurate or misleading information about named manufacturers is limited to instances of so-called "affirmative" disclosures "initiated" by the agency. Neither of these words is found *anywhere* in the CPSA. In fact, the plain language of the CPSA and of the FOIA unequivocally establishes that the disclosure of information in response to an FOIA request comes within the ambit of Section 6(b)(1).

A. The Language of Sections 6(a) and 6(b)(1) of the CPSA Plainly Indicates That Section 6(b)(1) Applies to Disclosures of Information in Response to FOIA Requests.

It is axiomatic that, in determining the meaning of a statute, courts are to presume that its terms are "used in their ordinary and usual sense and with the meaning commonly attributed to them." **Caminetti v. United States**, 242 U. S. 470, 485-86 (1917); *see* **NLRB v. Plasterers' Local 79**, 404 U. S. 116, 129 n. 24 (1971). The words of Section 6(b)(1) clearly indicate that the provision applies to the CPSC's disclosure of information in response to an FOIA request. This conclusion is amply supported by the language of Section 6(a) of the CPSA as confirmed by the FOIA itself.

By its terms Section 6(b)(1) governs "public disclosure" and information "to be disclosed to the public." Since FOIA requesters are members of the "public" and are described as such in the FOIA, a disclosure pursuant to the FOIA is clearly a "public disclosure" within the plain meaning of this provision.[18]

18. Both the CPSC and CFA suggest that Section 6(b)(1) applies only to "dissemination" of information initiated by the CPSC and not mere compliance with an FOIA request (*see, e.g.*, CPSC Brief at 15-17, CFA Brief at 15-16). While the term "dissemination" is used in some provisions of the CPSA and in its

The CPSC and CFA contend that the use of the word "public" in Section 6(b)(1) means that in order for the provision to apply, something more than disclosure in response to an FOIA request is required (*see* CPSC Brief at 30 n. 12, CFA Brief at 13). But as noted by the Court of Appeals (*see* Pet. App. 36a), another provision of Section 6 of the CPSA (Subsection 6(a)) clearly applicable to FOIA requests appears with the provision involved here (Subsection 6(b)(1)) under the general caption "*Public* disclosure of information" (emphasis added).[19] If Congress had intended to exclude FOIA requests from the term "public disclosure" as used in Section 6(b)(1), it surely would not have placed Section 6(a) under a caption that employs that very phrase.

As recognized by the Court of Appeals (*see* Pet. App. 35a-36a), Section 6(a) evidences Congressional awareness that FOIA requests would be made for information gathered by the CPSC, and its placement in the CPSA demonstrates that Congress viewed responses to such requests as "public disclosures." Moreover, the very language of Section 6(a)(1) establishes that compliance with an FOIA request is one type of disclosure of information "to the public" within the meaning of Section 6(b)(1).[20]

18. (Cont'd)
legislative history, it does not appear in Section 6(b)(1), the statutory provision at issue. In any event, it is difficult to perceive how the CPSC's disclosure of the information at issue here to FOIA requesters, particularly those involved in this litigation, would not constitute "dissemination" as that term is ordinarily used.

19. Section 6(a)(1) expressly refers to the FOIA and provides that the CPSC may withhold from the public information that is exempt from mandatory disclosure under that statute or "is otherwise protected by law from disclosure to the public." 15 U. S. C. §2055(a)(1).

Section 6(a)(2) of the CPSA provides that trade secrets and other information protected by the Trade Secrets Act, 18 U. S. C. § 1905, "shall be considered confidential and shall not be disclosed." 15 U. S. C. § 2055(a)(2). The CPSC and CFA concede that this provision applies to FOIA requests as well as to disclosures "initiated" by the CPSC (*see* CPSC Brief at 29-30, CFA Brief at 14).

Indeed, the FOIA itself is the clearest demonstration that the phrases "public disclosure" and disclosure "to the public" encompass disclosures in response to FOIA requests. When Congress enacted the FOIA in 1966 (six years before it enacted the CPSA), it stated in the preamble that its purpose was "to clarify and protect the right *of the public* to information."[21] The statute is codified at Section 552 of Title 5, which is captioned "Public information," and it repeatedly refers to disclosing information to the "public."[22] Indeed, the House Report on the FOIA states that the statute is designed to provide access to government records to "*the public at large.*"[23] If in enacting the CPSA Congress had intended to change the obvious implication that disclosures in response to FOIA requests are "public" disclosures, it certainly would have made this intention plain.

B. Other Provisions of the CPSA Also Demonstrate That Section 6(b)(1) Applies to Disclosures in Response to FOIA Requests.

Two other provisions of the CPSA also offer significant support for the conclusion that Section 6(b)(1) is

20. The Conference Report on the CPSA also clearly indicates that FOIA disclosures are "public" disclosures (*see* p. 30, *infra*).

21. Pub. L. No. 89-487, 80 Stat. 250 (1966) (emphasis added).

22. For example, 5 U. S. C. § 552(a) states that agencies must "make available" certain types of records "to the public"; 5 U. S. C. § 552(a)(1)(A) requires an agency to "publish . . . for the guidance of the public" descriptions of the ways in which "the public may obtain information"; and 5 U. S. C. § 552(a)(4)(A) refers to "the public interest" and the "general public."

23. H. R. Rep. No. 1497, 89th Cong., 2d Sess. 1 (1966) (emphasis added).

applicable to the disclosure of information in response to an FOIA request.

As was correctly noted by the Court of Appeals (*see* Pet. App. 39a), Section 25(c) of the CPSA, 15 U. S. C. § 2074(c), demonstrates that Section 6(b)(1) is applicable to at least some information obtained or generated by the CPSC, the disclosure of which could be requested under the FOIA. When Congress enacted Section 6(b)(1), it also enacted Section 25(c), which requires the CPSC to make "available to the public" accident and investigation reports generated by the CPSC even if the reports would be exempt from disclosure under the FOIA, *but only to the extent permitted by Sections 6(a)(2) and 6(b)(1).*[24]

There is no doubt that, in using the words "available to the public" in Section 25(c), Congress was referring to disclosures in response to FOIA requests. The House Report on the CPSA states that Section 25(c) is a limitation on the CPSC's authority to deny access to investigatory files under Exemption 7 of the FOIA, 5 U. S. C. § 552(b)(7).[25] Thus, even if Section 6(b)(1) were interpreted to be inapplicable to FOIA disclosures as urged by the CPSC and CFA, it nevertheless would be

24. Section 25(c) provides in pertinent part:

"Subject to [Sections 6(a)(2) and 6(b)] of this [Act] but notwithstanding [Section 6(a)(1)] of this [Act], (1) any accident or investigation report made under this [Act] by an officer or employee of the Commission shall be made available to the public in a manner which will not identify any injured person . . . ."

25. H. R. Rep. No. 1153, 92d Cong., 2d Sess. 31 (1972).

Section 25(c)'s reference to FOIA disclosures in the words "available to the public" reinforces the ordinary and natural reading of the phrase "public disclosure" as used in Section 6(b)(1) to include disclosures in response to FOIA requests.

applicable to some FOIA disclosures by virtue of Section 25(c). There is not a shred of evidence that Congress intended such an internal inconsistency in the CPSA. Accordingly, Section 6(b)(1) must apply not only to *some* but to *all* FOIA requests.

Additionally, and "[m]ost significantly" from the viewpoint of the Court of Appeals (Pet. App. 38a), Section 6(b)(2) of the CPSA, 15 U. S. C. § 2055(b)(2), contains specific exceptions to the requirements of Section 6(b)(1).[26] But the list of those exceptions does not include the disclosure of information in response to an FOIA request. As the Court of Appeals aptly stated, if Congress had intended to exclude FOIA disclosures from Section 6(b)(1), "it would have done so explicitly in section 6(b)(2)" (Pet. App. 38a). *See* **Andrus v. Allard,** — U. S. —, —, 100 S. Ct. 318, 322 (1979); **TVA v. Hill,** 437 U. S. 153, 173 (1978). Since Congress chose not to except disclosures in response to FOIA requests from the scope of Section 6(b)(1), there is no reason for this Court to do so.

* * *

Thus, far from suggesting that the CPSC's position in this litigation is correct, the language of the CPSA and of the FOIA clearly supports the holdings below that Section 6(b)(1) applies to disclosures in response to FOIA requests. Indeed, the language is so plain that no contrary decision could be justified. *See, e.g.,* **United States v. Oregon,** 366 U. S. 643, 648 (1961); **Caminetti v. United States,** 242 U. S. 470, 485, 490 (1917).

26. These exceptions involve, for example, the disclosure of information concerning an imminently hazardous product and disclosures in the course of an administrative or judicial proceeding under the CPSA.

III.

The Legislative History of the CPSA Confirms That in Enacting Section 6(b)(1) Congress Sought To Safeguard Manufacturers' Reputations from Harm Caused by Any Public Disclosure of Inaccurate or Misleading Information.

The Court of Appeals examined the legislative history of Section 6(b)(1) at great length and concluded that "[t]here is not an inkling of support" for the CPSC's self-serving assertion that Congress intended Section 6(b)(1) to apply only when the CPSC "initiates" disclosure (Pet. App. 54a).[27] To the contrary, the conclusion compelled by the face of the statute is reinforced by its legislative history.

1. The Congress that enacted the CPSA gave the CPSC extraordinary powers not previously accorded to any other government agency to gather, analyze, and disseminate vast amounts of private information.[28] It also imposed specially tailored safeguards to protect manufacturers' reputations from damage arising from improper disclosure of this information. As the House Report on the CPSA noted:

> "If the Commission is to act responsibly and with adequate basis, it must have complete and full access to information relevant to its statutory responsibilities. Accordingly, the committee has built into this bill broad information-gathering powers. It recognizes

27. That assertion is repeated before this Court on numerous occasions (*see, e.g.*, CPSC Brief at 20-21, 23, 33; *see also* CFA Brief at 13, 15). The assertion is unaccompanied by any citation for the simple reason that there is no provision to be cited.

28. *See, e.g.*, 15 U. S. C. §§ 2054, 2064(c), 2076(e).

> that in so doing it has recommended giving the Commission the means of gaining access to a great deal of information which would not otherwise be available to the public or to Government. Much of this relates to trade secrets or other sensitive cost and competitive information. Accordingly, the committee has written into section 6 of the bill detailed requirements and limitations relating to the Commission's authority to disclose information which it acquires in the conduct of its responsibilities under this act." [29]

The Court of Appeals observed that the House Report does not support the position urged by the CPSC and CFA, since the Report "made no distinction between those aspects of section 6 expressly governing FOIA requests and the provisions of section 6(b)(1)" (Pet. App. 48a). Thus the House Report does not in any way suggest that the Section 6(b)(1) safeguards are not to apply when the CPSC discloses information in response to an FOIA request.

Nor does the Conference Report on the CPSA contain any such suggestion. Indeed, in the words of the Court of Appeals, the three substantive disclosure limitations in Section 6 (Sections 6(a)(1), 6(a)(2), and 6(b)(1)) are discussed in "almost the same breath" in a single paragraph of that Report (Pet. App. 53a), and in fact the discussion of Section 6(b)(1) is sandwiched between the discussions of Sections 6(a)(1) and 6(a)(2).[30] This treatment is in-

29. H. R. Rep. No. 1153, 92d Cong., 2d Sess. 31 (1972).

30. The Conference Report describes the provisions of Section 6 of the CPSA in part as follows:

> "Information obtained by the Commission which contained or related to a trade secret or other matter referred to in section 1905, title 18, United States Code, could not be publicly disclosed . . . . The Commission was directed to take steps to assure that publicly disclosed information from which spe-

consistent with the distinction between Sections 6(a) and 6(b) that the CPSC proposes. Moreover, the statement in the Report that no information need be "publicly disclosed" if it is exempt from disclosure under the FOIA [31] is another indication that FOIA disclosures are indeed "public" disclosures within the compass of Section 6(b)(1).[32]

2. The legislative background of Section 6(b)(1) offers further insight into the considerations of fairness to manufacturers that prompted the enactment of this provision and the Congressional intent that the provision would apply to *all* CPSC disclosures. The comments of officials in the Administration, whose proposed bill was the source of the language that eventually became Section 6(b)(1), are especially pertinent.[33] These officials clearly

30. (Cont'd)
cific manufacturers or distributors could be identified was accurate and that the disclosure was fair in the circumstances and reasonably related to carrying out its duties. No information would be required to be publicly disclosed if it is information described in Section 552(b), title 5, United States Code (relating to information which is entitled to be protected from public access under the Freedom of Information Act), or which is otherwise protected by law from disclosure to the public." H. R. Rep. No. 1593, 92d Cong., 2d Sess. 40-41, *reprinted in* [1972] U. S. Code Cong. & Ad. News 4596, 4632-33.

31. *Id.*

32. Similarly, in commenting on an early Senate version of the CPSA, the Office of Management and Budget employed the term "public disclosure" to refer to information released under the FOIA. S. Rep. No. 749, 92d Cong., 2d Sess. 124 (1972).

33. In 1971, proposed consumer product safety legislation was introduced on behalf of the Administration in both the Senate (S. 1797) and the House (H. R. 8110). Section 4(c) of these two bills contained information disclosure limitations virtually identical to those eventually enacted in Section 6(b)(1) of the CPSA (*see* Pet. App. 43a-44a for the language of the Administration's proposal). Although the bill passed by the Senate omitted these safeguards (*see* S. Rep. No. 749, 92d Cong., 2d Sess. 49, 51 (1972) and 118 Cong. Rec. 21,903 (1972)), the bill passed by the House (H. R. 15003) incorporated the Administration's proposal in all significant respects. *See* H. R. Rep. No. 1153, 92d Cong., 2d Sess. 5, 24 (1972); 118 Cong. Rec. 31,411 (1972). The information disclosure limitations embodied in the House bill were accepted by the Conference Committee and ultimately became law. *See* H. R. Rep. No. 1593, 92d Cong., 2d Sess. 7, *reprinted in* [1972] U. S. Code Cong. & Ad. News 4596, 4633; 118 Cong. Rec. 36,046 (1972); *id.* at 36,199.

considered it essential to have safeguards in the CPSA against *any* disclosure of inaccurate and misleading information that would identify a particular manufacturer.

For example, as noted by the Court of Appeals, the analysis of Section 6 provided by Elliott L. Richardson, Secretary of the Department of Health, Education, and Welfare (the agency that initially drafted the provision), "made no distinction between the methods of information disclosure that were to be covered by [Section 6(a)] and [Section 6(b)]" (Pet. App. 48a).[34] Similarly, the General Counsel of the Department of Commerce wrote:

> "[W]e believe that in the interest of fairness the disclosure of *any* information should be attendant with safeguards. These include prior notice to manufacturers, the right of the manufacturer to rebut

34. Consumer Product Safety Act: Hearings on H. R. 8110, H. R. 8157, H. R. 260, & H. R. 3813 Before the Subcomm. on Commerce & Finance of the House Comm. on Interstate & Foreign Commerce, 92d Cong., 1st & 2d Sess. 188 (1971-72) ("House Hearings") (quoted by the Court of Appeals at Pet. App. 47a).

In paraphrasing what is now Section 6(b)(1) for the Senate Committee, Secretary Richardson also made no distinction between the types of disclosure to which it was intended to apply. Consumer Product Safety Act: Hearings on S. 983, S. 1685, & S. 1797 Before the Senate Comm. on Commerce, 92d Cong., 1st Sess. 124 (1971) ("Senate Hearings"). Thus, the CPSC's reliance on this testimony to support its position (*see* CPSC Brief at 34) is entirely misplaced.

false information, and a requirement that the information be fair and accurate." (emphasis added).[35]

Neither Department would have treated disclosures in response to FOIA requests differently from disclosures "initiated" by the CPSC.

Other Administration officials stressed that "information concerning consumer products which may be wholly or partially inaccurate can be very damaging to a business enterprise and misleading to the consumer" [36] and pointed out that protecting companies against disclosure of inaccurate or misleading information would also benefit consumers and the government "by promoting accuracy of information released [and] foster[ing] willingness of manufacturers to cooperate in furnishing the information necessary for prompt and vigorous product safety enforcement." [37] There is no indication in any of these statements that the Administration's concern was in establishing safeguards that would be applicable only for so-called "affirmative" CPSC disclosures.

3. The apprehensions of industry spokesmen also were addressed to *any* disclosure of misleading or inaccurate information about named manufacturers, regardless of the form of disclosure. Contrary to the CPSC's contention (*see* CPSC Brief at 33), industry statements do not reflect a concern only as to the impact of adverse public disclosures "initiated" by the CPSC.

35. S. Rep. No. 749, 92d Cong., 2d Sess. 100 (1972); *accord*, *id.* at 102.

36. *Id.* at 124 (letter of Frank Carlucci, Associate Director, Office of Management and Budget); *see id.* at 96, 97 (letter of Richard Kleindeinst, Deputy Attorney General).

37. *Id.* at 79 (statement of Virginia Knauer, Special Assistant to the President for Consumer Affairs); *see also* House Hearings, *supra* p. 31 n. 34, at 969-70 (remarks of Elliot L. Richardson, Secretary, Department of Health, Education and Welfare).

The remarks of the General Electric Company representative upon which the CPSC relies did deal largely with the serious impact that would be created by the disclosure of premature, inaccurate, or misleading information "[i]ssued under the dignity and with the apparent imprimatur of the U. S. Government." [38] Nothing even in these remarks indicates a belief that such an "apparent" imprimatur exists only when the CPSC "initiates" the disclosure.[39] Moreover, as stated by the Court of Appeals, "others who spoke in behalf of [the Administration bill] favored its disclosure provisions on more general grounds" (Pet. App. 46a).[40]

38. *Id.* at 1065-66 (remarks of James F. Young, Vice President, General Electric Company) (quoted in CPSC Brief at 34).

39. Each of the other statements cited by the CPSC as dealing only with so-called "affirmative disclosures" to the same effect (*see* CPSC Brief at 34) either is irrelevant or in fact cuts against the CPSC's position.

The first three references are statements not of industry but of the National Commission on Product Safety ("NCPS"), the predecessor of the CPSC, and focus not on Section 6(b)(1) but on what was perceived as a general need for information about product defects to be available to the public. *Id.* at 306-07, 432, 446-47. The NCPS had proposed model product safety legislation but, as noted by the Court of Appeals (*see* Pet. App. 45a), the House bill introduced by Representative Moss modeled on the NCPS proposal did not contain the safeguards against disclosure of inaccurate or misleading information that were enacted in Section 6(b)(1). Accordingly, the NCPS's statements and comments of others on the NCPS proposal (*e.g.*, *id.* at 1210-11) should be given no weight. The same is true of Representative Moss's remarks (*id.* at 910), which also are cited by the CPSC.

The other industry statements cited by the CPSC either make no distinction between agency-initiated disclosures and disclosures to FOIA requesters (*id.* at 1130, 1318) or explicitly state that the Section 6(b)(1) disclosure limitations should apply to *all* CPSC disclosures (*id.* at 776, 1196-97, 1237).

The CPSC also lists as the remarks of an industry spokesman a statement of HEW Secretary Richardson (*id.* at 969), whose overall testimony clearly does not support the CPSC's strained reading of Section 6(b)(1) (*see* p. 31 n. 34, *supra*).

40. For example, the prepared statement of one industry representative noted:

Thus, far from supporting any distinction between the types of disclosures to which Section 6(b)(1) applies, the comments of industry further support the conclusion that the disclosure limitations in Section 6(b)(1) were not viewed as being applicable only to disclosures "initiated" by the CPSC.[41]

* * *

The foregoing analysis of the legislative history of Section 6(b)(1) makes it crystal clear that Congress never

40. (Cont'd)

"Authority to collect and disseminate information carries with it a responsibility not to disclose data that may injure a company or reveal confidential information . . . . A statute should also assure that *any* information to be made public is accurate . . . ." (emphasis added).

Id. at 1237 (statement of George P. Lamb, General Counsel, Association of Home Appliance Manufacturers); *accord, id.* at 1197 (remarks of Bernard H. Falk, President, National Electrical Manufacturers Association) ("[n]o information should be disclosed which is inaccurate, misleading or incomplete"); *see also id.* at 1324 (prepared statement of Parts Division, Electronic Industries Association); Senate Hearings, *supra* p. 31 n. 34, at 755 (remarks of Dr. S. W. Herwald, Westinghouse Corporation, representing National Electric Manufacturers Association) ("no information should be disclosed which has not at least had a chance to have been heard as to whether somebody believes it is inaccurate or misleading").

41. Nor is there any support for the CPSC's position in the comments of individual legislators during the debates. *See, e.g.*, 118 Cong. Rec. 31,381 (1972) (remarks of Rep. Broyhill).

The reliance of the CPSC and CFA on the remarks of Representative Crane (*id.* at 31,389; *see* CPSC Brief at 34 n. 14, CFA Brief at 15 n. 14) is misplaced. As pointed out by the Court of Appeals, the fact that Representative Crane, an *opponent* of the CPSA, saw the potential for damage to the reputation of manufacturers from release of inaccurate and misleading information "*in spite of the protective provisions of section 6(b)(1)*, provides no inkling of support for the Commission's view that that section is limited to the affirmative disclosure of information" (Pet. App. 52a) (emphasis by the Court). Indeed, if anything, the CPSC's interpretation of Section 6(b)(1) would only have exacerbated the fears expressed by Representative Crane.

intended to create an unstated exception from that provision's requirements for CPSC disclosures in response to FOIA requests. As aptly summarized by the Court of Appeals:

> "[T]he only reasonable inference that can be drawn from the legislative history of section 6(b)(1) is that the members of the Administration who introduced it, the legislators who drafted it, reported it favorably for consideration by the House and then spoke in favor of its enactment, and the conferees who incorporated it into the final legislative product, did not intend that its protections from the misleading, inaccurate and unfair public dissemination of information were to be applied only to what the Commission refers to as affirmative disclosures" (Pet. App. 53a-54a).

IV.

Nothing in the FOIA Either Justifies or Supports the Conclusion That Section 6(b)(1) of the CPSA Is Inapplicable to FOIA Requests.

Both the CPSC and CFA place their principal reliance in this case on what they perceive as inherent inconsistencies between Section 6(b)(1) of the CPSA and the FOIA (*see* CPSC Brief at 15-32, CFA Brief at 6-12). However, while the disclosure limitations contained in Section 6(b)(1) are naturally "at odds" (CFA Brief at 11) with the general pro-disclosure philosophy of the FOIA, this point in no way advances the unsupportedly narrow interpretation of Section 6(b)(1) for which the CPSC and CFA argue.

Under established canons of statutory construction, the specific policies behind the enactment of Section

6(b)(1) control over the more general policies of the FOIA. Indeed, Exemption 3 of the FOIA, 5 U. S. C. § 552(b)(3), explicitly recognizes the need for accommodation between the specific restrictions of a non-disclosure statute like Section 6(b)(1) and the general pro-disclosure emphasis of the FOIA. Moreover, contrary to the arguments of the CPSC and CFA, the Court of Appeals correctly held that there is no insoluble conflict between the procedural frameworks of the two statutory schemes.

A. The General Pro-Disclosure Philosophy of the FOIA Does Not Outweigh the Specific Protections of Section 6(b)(1).

The CPSC and CFA stress the broad remedial scheme of the FOIA, which is described as being based on the concept of "mandatory prompt disclosure" (CFA Brief at 7).[42] They then argue that the reading of Section 6(b)(1) adopted by the Court of Appeals conflicts with this general philosophy of the FOIA and therefore cannot be correct. The argument ignores the specific purpose and requirements of Section 6(b)(1), which must govern over the more general philosophy of the FOIA.

Notably missing from the brief of either the CPSC or CFA is any explanation as to why the CPSA and the duties it imposes should be blithely discarded so as to permit, in the name of the FOIA, disclosure of information that the CPSC obtained only because of its information-

42. For example, the CPSC notes that the Congressional purpose in enacting the FOIA was, in the words of this Court, "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny" (CPSC Brief at 18, *quoting* **Department of the Air Force v. Rose,** 425 U. S. 352, 361 (1976)). CFA adds that "the basic principle underlying the FOIA is that the public has a right to know information upon which the government relies in making decisions, regardless of the accuracy of that information" (CFA Brief at 11).

gathering powers under the very statutory scheme it now seeks to cast aside. In fact, it is extremely doubtful that the FOIA, a general statute governing public access to information about the government, could *ever* be controlling over Section 6 of the CPSA, a statute governing such matters specifically with respect to the CPSC. **Radzanower v. Touche Ross & Co.,** 426 U. S. 148, 153 (1976); **Morton v. Mancari,** 417 U. S. 535, 550-51 (1974). The CPSC is not free to supplant its own enabling act with the FOIA.

As a statute prohibiting disclosure of certain carefully specified information, Section 6(b)(1) obviously reflects a philosophy different from the pro-disclosure policy of the FOIA. This does not create any insoluble conflict between the two statutes, all the more when Exemption 3 of the FOIA explicitly recognizes the need to accommodate non-disclosure statutes[43] and permits an agency to withhold from an FOIA requester information whose disclosure would run afoul of such statutes. If the CPSC's argument were correct, there would be no reason for Exemption 3 to have been enacted, since the FOIA would automatically control over every non-disclosure statute.[44] Obviously,

43. At one point the CPSC suggests that the inclusion, with the raw data, of a statement as to its inaccuracy might be "a sensible and fair accommodation of the manufacturers' and labelers' interests" (CPSC Brief at 7 n. 3, *quoting* **Pierce & Stevens Chem. Corp. v. CPSC,** 585 F. 2d 1382, 1388 n. 28 (2d Cir. 1978)). The disclaimer proposed in this case (*see* A. 66) would not have mentioned most of the flaws in the data collected by the CPSC that caused the District Court to describe the information as a "melange of inaccuracies" (A. 104). However, even a broader disclaimer would not have been sufficient to remove the damage to the manufacturers that the courts below correctly found Section 6(b)(1) was designed to avoid.

44. Indeed, if the general pro-disclosure philosophy of the FOIA were always controlling, there would be no exemptions of any kind from the Act.

this is not so. *See, e.g.*, **Chrysler Corp. v. Brown**, 441 U. S. 281, 317-19 (1979).

B. The Procedural Framework of the FOIA Is Not Incompatible with Section 6(b)(1).

Both the CPSC and CFA point to various aspects of the procedural framework established by Section 6(b)(1) as evidence of its inconsistency with the FOIA. However, as the Court of Appeals aptly noted, "[s]uch inconsistencies as exist between the two statutes are not unusual or uncontemplated by Congress" (Pet. App. 62a).

The CPSC and CFA first assert (*see* CPSC Brief at 23-24; *see also* CFA Brief at 7-10) that the thirty-day notice and comment provision of Section 6(b)(1) conflicts with the so-called "prompt" disclosure scheme of the FOIA requiring the agency to determine within "ten [working] days" after receipt whether or not it will comply with an FOIA request (*see* 5 U. S. C. § 552(a)(6)(A)(i)). However, as the District Court noted (*see* Pet. App. 85a), when Section 6(b)(1) was enacted in 1972 the existing FOIA provision required only that information requested be made available "promptly."[45] The ten-day rule of the FOIA was not enacted until 1974,[46] and it certainly did not repeal Section 6(b)(1). *See* **Cantor v. Detroit Edison Co.**, 428 U. S. 579, 596-97 (1976); **Regional Rail Reorganization Act Cases**, 419 U. S. 102, 133-34 (1974).

In any event, the Court of Appeals correctly pointed out (*see* Pet. App. 60a-61a) that the FOIA requires only that the decision whether to grant a request be made within ten days. The CPSC can easily satisfy this requirement by notifying the requester at the conclusion of the ten-day period either that the information will be released when Section 6(b)(1)'s notice and comment provisions have been complied with or that release will be denied initially pending compliance with the substantive provisions of Section 6(b)(1).[47] While compliance with Section 6(b)(1) may occasionally cause some delay in the release of information, it should be recognized that agencies already do not always comply with the FOIA deadlines, especially when, as here, large volumes of documents are involved, and the statute itself provides a certain grace period. *See* 5 U. S. C. §§ 552(a)(6)(B), (C); **Open America v. Watergate Special Prosecution Force**, 547 F. 2d 605, 610-13 (D. C. Cir. 1976).

The CPSC and CFA also misread Section 6(b)(1) in several different ways in an effort to demonstrate some basic incompatibility with the FOIA. Thus, for example, they argue that compliance with Section 6(b)(1)'s substantive requirements will necessarily entail "lengthy delays" (CFA Brief at 8-9; *see* CPSC Brief at 24). This is not so. Contrary to the CPSC's and CFA's suggestions, Section 6(b)(1) does not require the CPSC to verify the accuracy and fairness of each piece of information it dis-

45. Pub. L. No. 90-23, 81 Stat. 54 (1967).

46. Pub. L. No. 93-502, 88 Stat. 1561 (1974).

47. The experience of the Environmental Protection Agency illustrates the ease with which this can be accomplished. For example, the EPA has reconciled a thirty-day notice requirement in Section 10 of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U. S. C. § 136h(d), with the FOIA's ten-day rule by promulgating regulations providing that FOIA requests for information that might be entitled to confidential treatment will receive "a 'procedural' initial denial" pending a response from the submitter. *See* 41 Fed. Reg. 36,920 (1976); 40 C. F. R. § 2.204(d)(1)(ii). A similar solution has been reached with respect to the thirty-day notice provision in Section 14(c)(2)(A) of the Toxic Substances Control Act, 15 U. S. C. § 2613(c)(2)(A). *See* 40 C. F. R. § 2.306(d).

closes. The CPSC need only "take reasonable steps to assure" the accuracy and fairness of the information.[48]

The CPSC and CFA next contend that Section 6(b)(1) requires the CPSC to review and, where necessary, to correct or revise information to be disclosed, activities they assert are not contemplated by the FOIA (*see* CPSC Brief at 25; CFA Brief at 10-11). In **NLRB v. Sears, Roebuck & Co.**, 421 U. S. 132, 161-62 (1975), this Court stated that the FOIA does not require agencies to create records that did not previously exist. But neither does Section 6(b)(1). Section 6(b)(1) merely provides that if existing records are reasonably believed to be inaccurate or misleading, the CPSC may not produce them unless and until manufacturer identification is deleted. The deletion technique is fully endorsed by the FOIA (*see* 5 U. S. C. § 552(b)), and has frequently been used by the CPSC in responding to FOIA requests.[49] As recognized in **Long v. IRS**, 596 F. 2d 362, 365-66 (9th Cir. 1979), the technique is not inconsistent with this Court's holding in **Sears**.[50]

48. Of course, if the CPSC in its own discretion decides that unverified and inaccurate information is needed in its data base for rulemaking or investigatory purposes (*see, e.g.*, A. 297), then it should deny release of that information to FOIA requesters so long as it permits identification of the manufacturers.

49. *See, e.g.*, CPSC Annual Report on the Administration of the FOIA, Calendar Year 1978 (Mar. 1, 1979), at 1, 3, 4.

50. The CPSC and CFA also assert that the fairness and relatedness inquiries required by Section 6(b)(1) "involve a weighing of the identity and interest of the requester and the likely use to which he would put the information sought," and that these concerns are "impermissible in connection with FOIA requests" (CPSC Brief at 26; *see also* CFA Brief at 11-12). Again, there is nothing in Section 6(b)(1) to support this claimed construction of the statute. If a manufacturer is entitled to have information protected from public disclosure, then any disclosure is barred.

Additionally, the CPSC and CFA profess themselves unable to contemplate how the FOIA can be squared with Section 6(b)(1)'s requirement that the CPSC "publish a retraction" of released information that is later discovered to be inaccurate or misleading (*see* CPSC Brief at 27, CFA Brief at 14-15).[51] But as the Court of Appeals recognized (*see* Pet. App. 37a), the duty to "publish a retraction" is in no way incompatible with the FOIA and is what one would expect an agency to do, even if not obligated by law. Moreover, presumably a retraction will not often be necessary, since the manufacturer generally will have brought any problems in the information to the CPSC's attention within the notice and comment period provided by Section 6(b)(1) and prior to any FOIA disclosure.[52]

Finally, the CPSC conjures up some vast administrative burden that supposedly will be created by the decision below (*see* CPSC Brief at 13). This "burden" argument is distinctly reminiscent of the reaction of many administrators to the advent of the FOIA itself.[53] However, as the Attorney General has stated with respect to the FOIA,

51. CFA's reliance on the use of the term "publish" to indicate something more than release to an FOIA requester (*see* CFA Brief at 15) ignores the facts that the term may be used interchangeably with the term "disclose" and includes the concept of imparting knowledge "to one or more persons." *See* Webster's Third New International Dictionary (unabridged ed. 1963) 1837 & Explanatory Notes, at 20a. Similarly, the House Report's listing of several ways in which the retraction might be published (H. R. Rep. No. 1153, 92d Cong., 2d Sess. 32 (1972)) is of no avail to the CPSC (*see* CPSC Brief at 36) because there is no suggestion that the list is all-inclusive.

52. The argument that a retraction is necessary only where the disclosure was made "in administration of" the CPSA (*see* CPSC Brief at 27 n. 11) is without merit. If, as we demonstrate elsewhere, the Section 6(b)(1) procedures are applicable to FOIA requests, then compliance with such requests obviously requires action by the CPSC in the administration of the CPSA.

53. *See, e.g.*, Federal Public Records Law (Part I): Hearings on H. R. 5012 *et al.* Before a Subcomm. of the House Comm. on

"burden is no excuse for intentionally disregarding or slighting the requirements of the law, and where necessary, additional resources should be sought or provided to achieve full compliance." [54]

Moreover, any "burden" that may be imposed on the CPSC by Section 6(b)(1) is no more significant than what is otherwise necessary. Compliance with the FOIA by any agency requires more than location and production of documents. Information must be reviewed against disclosure limitations such as those of the Trade Secrets Act, 18 U. S. C. § 1905,[55] and Exemption 4 of the FOIA, 5 U. S. C. § 552(b)(4).[56] Additionally, the CPSC's own regulations require it to withhold information exempt from mandatory disclosure under the FOIA pursuant to 5 U. S. C. § 552(b) whenever the agency "determines that disclosure is contrary to the public interest." 16 C. F. R. § 1015.15(b). These statutes and regulations, like Section

53. (Cont'd)
Government Operations, 89th Cong., 1st Sess. 48, 56, 61 (1965) (statement of Fred B. Smith, Acting General Counsel, Treasury Department) ("there would be a tremendous additional burden placed on the Government, and we would have to hire a lot of people to handle these requests"); *accord, id.* at 218 (letter from Acting General Counsel of the Department of Defense); *id.* at 223 (letter from W. Willard Wirtz, Secretary of Labor); *id.* at 263 (letter from W. J. Driver, Administrator, Veterans Administration).

54. Attorney General's 1974 FOIA Amendments Memorandum to Executive Departments, at 13 (1975).

55. *See* **Chrysler Corp. v. Brown,** 441 U. S. 281, 318 (1979). In the CPSC's case, Section 6(a)(2) of the CPSA, 15 U. S. C. § 2055(a)(2), must also be considered and would not allow for release of trade secrets or other protected information even pursuant to quasi-legislative regulations, as does the Trade Secrets Act.

56. In determining whether information comes within Exemption 4, agencies consider such questions as whether disclosure would "impair the Government's ability to obtain necessary information in the future" or "cause substantial harm to the competitive position of the person from whom the information was obtained." **National Parks & Conservation Ass'n v. Morton,** 498 F. 2d 765, 770 (D. C. Cir. 1974). The resolution of these questions is not always easy and may be quite time-consuming.

6(b)(1), may complicate disclosure, require deletion of some material before production of the balance, or, indeed, make disclosure impossible altogether. But they may not be ignored merely because they impose some limitation on the agency's ability to disclose information in a wholesale fashion.

In any event, it has not been established that compliance with Section 6(b)(1) before releasing information to an FOIA requester would create any undue "burden." The CPSC asserts that it receives nearly 8,000 FOIA requests annually, the vast majority of which "presumably" seek information from which a manufacturer's identity could be readily ascertained (CPSC Brief at 30-31). There appears to be no basis for this "presumption," and neither of these assertions finds any evidence in the record. The fact is that simple deletion of a manufacturer's identity to ease whatever burden is imposed by Section 6(b)(1) may often also satisfy the requester. There may be additional ways in which the objectives of both Section 6(b)(1) and the FOIA can be accommodated.[57]

57. For example, the CPSC states that it receives approximately 10,000 consumer complaints each year and that the accuracy and fairness of these complaints "can rarely be determined" from the documents themselves (CPSC Brief at 31; *see also* CFA Brief at 22-23 n. 22). Of course, not all of these complaints would be responsive to a typical FOIA request and some might be protected by an exemption if the agency chose to invoke it. *See* Attorney General's 1974 FOIA Amendments Memorandum to Executive Departments, at 6 (1975) (suggesting that information may come within Exemption 7, 5 U. S. C. § 552(b)(7), even when not generated through the agency's "initiative"). Indeed, many consumer complaints may not even identify a specific manufacturer and thus would pose no Section 6(b)(1) problem.

Moreover, the CPSC presumably routinely investigates most consumer complaints or discusses them with the manufacturers involved, since this is part of the agency's function. *See, e.g.,* 15 U. S. C. §§ 2054(a), 2055(c). And where FOIA requests are made for as yet unreviewed complaints, the CPSC's communication

Despite past suggestions by the Attorney General that agencies establish guidelines to aid them in complying with the FOIA,[58] the CPSC has made no effort to achieve the accommodation between Section 6(b)(1) and the FOIA that is necessary here, either by promulgating substantive regulations or by developing internal operating procedures. That being the case, it is difficult to comprehend how the CPSC can be so certain that the applicability of Section 6(b)(1) to FOIA requests will create any excessive burden. Indeed, the mere handful of objections to disclosure received by this agency in the past effectively demonstrates how overstated is the burden claim now being made.[59]

We have little doubt that the CPSC's declared policy of discretionary disclosure under the FOIA whenever pos-

57. (Cont'd)
with the identified manufacturer under Section 6(b)(1) and the resulting comments normally will provide sufficient basis for satisfying the provision.

58. *See, e.g.*, Attorney General's 1974 FOIA Amendments Memorandum to Executive Departments, at 12 (1975).

59. Normally there should be little effort required to satisfy a manufacturer's concern as to the propriety of a disclosure under Section 6(b)(1). In response to an FOIA request recently made by counsel for one of the manufacturers, the CPSC has stated both that it receives 8,000 FOIA requests each year, and that it received only twelve objections to the release of documents in the first ten and one-half months of 1979. Only two of these objections were based on Section 6(b)(1). The CPSC believes that only five objections were received in 1978 (two of which raised Section 6(b)(1)) and only three in 1977 (one of which raised Section 6(b)(1)).

Additionally, there appear to be only four reported cases involving the CPSC and the FOIA in the eight years that the agency has been in existence. Two of these cases arose from the information involved in this case, and the third, **Pierce & Stevens Chem. Corp. v. CPSC,** 585 F. 2d 1382 (2d Cir. 1978), is the decision cited by the CPSC in support of its position. These three cases were all filed in 1975. The fourth case, **International Harvester Co. v. CPSC,** No. 79 C 1185 (N. D. Ill.), was filed in 1979. *See* CPSC 1979 Annual Report, Appendix I, at 111.

sible and without regard to such provisions as Exemptions 5 and 7, 5 U. S. C. §§ 552(b)(5) and (7), increases the quantity of records that may be susceptible to production. But the CPSC can hardly complain about a burden that it has largely created.[60] In short, like any other minor inconsistencies that may exist between Section 6(b)(1) and the FOIA, the alleged burden created by the decision below simply is not sufficient to justify a finding of some insoluble conflict between the statutes.

C. Exemption 3 of the FOIA Permits the CPSC To Withhold Information That May Not Be Disclosed Under Section 6(b)(1).

The CPSC's brief completely ignores the significant holding of both courts below (*see* Pet. App. 66a-67a, 94a) that Section 6(b)(1) is a withholding statute within the meaning of Exemption 3 of the FOIA, 5 U. S. C. § 552(b)(3),[61] and thus that the FOIA does not require

60. Moreover, the number of instances in which the CPSC must apply the criteria of Section 6(b)(1) to documents requested under FOIA should be reduced to the extent that the CPSC receives requests for documents that are not "agency records" and hence not subject to the requirements of the FOIA. 5 U. S. C. §§ 552(a)(3), (4)(B); *see* **Kissinger v. Reporters Comm. for Freedom of the Press,** — U. S. —, —, 48 U. S. L. W. 4223, 4227 (1980); **Ryan v. Department of Justice,** — F. 2d —, — (D. C. Cir. Jan. 7, 1980) (No. 79-1777) (slip opin. at 6); *see also, e.g.*, **Goland v. CIA,** 607 F. 2d 339, 346-47 (D. C. Cir. 1978), *petition for cert. filed,* 48 U. S. L. W. 3005 (July 10, 1979) (No. 78-1924); **Warth v. Department of Justice,** 595 F. 2d 521, 523 n. 7 (9th Cir. 1979); **Committee on Masonic Homes v. NLRB,** 556 F. 2d 214, 218 n. 4 (3d Cir. 1977). Indeed, it may be that documents (like those involved here) that an agency obtains from private parties by compulsory processes normally are not "agency records" for FOIA purposes. *See* **FTC v. Anderson,** — F. 2d —, —, 1979-2 CCH Trade Cas. ¶ 62,837, at 78,827, 78,828 (D. C. Cir. Sept. 17, 1979).

61. Exemption 3 excludes from mandatory disclosure pursuant to the FOIA those matters that are:

> "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion

the CPSC to disclose documents as to which it has not complied with Section 6(b)(1).[62] The CPSC argued in the Court of Appeals (*see* Pet. App. 63a), and presumably still maintains, that Section 6(b)(1) cannot be an Exemption 3 statute because it was not intended to apply to FOIA requests. Of course, in the words of the Court of Appeals, the contrary reading of Congressional intent demonstrated by the language and legislative history of Section 6(b)(1) (*see* pp. 22-35, *supra*) "disposes of [this] argument" (Pet. App. 63a). However, because CFA devotes a substantial portion of its argument to the Exemption 3 question (*see* CFA Brief at 20-29), we will briefly demonstrate the errors in its position.

The current language of Exemption 3 was enacted in 1976[63] and was intended to overrule this Court's decision in **FAA Administrator v. Robertson,** 422 U. S. 255 (1975).[64] As noted by the Court of Appeals (*see* Pet. App. 65a), the amendment was designed to exclude from Exemption 3 those statutes that invested agencies with very broad dis-

61. (Cont'd)

on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

Prior to 1976 the statute did not contain the proviso. *See* Pub. L. No. 90-23, 81 Stat. 54 (1967).

62. Incredibly, the CPSC states that "[t]he lower courts in the present case have not yet decided whether the accident reports submitted by respondents fall within one or more of the FOIA's exemptions from mandatory disclosure" (CPSC Brief at 22 n. 7). This is completely incorrect as to Exemption 3.

63. Pub. L. No. 94-409, 90 Stat. 1247 (1976).

64. H. R. Rep. No. 1441, 94th Cong. 2d Sess. 25, *reprinted in* [1976] U. S. Code Cong. & Ad. News 2244, 2261.

The District Court's preliminary injunction opinion in this case was issued prior to the 1976 amendment to Exemption 3 and was based in part on the **Robertson** decision (*see* A. 115-16). On reconsideration Judge Latchum reaffirmed his holding that Section 6(b)(1) qualified as an Exemption 3 statute (*see* Pet. App. 87a). It is this holding that was affirmed by the Court of Appeals (*see* Pet. App. 66a-67a).

cretion or "*carte blanche* to withhold any information [they] please[d]."[65] *See* **Chamberlain v. Kurtz,** 589 F. 2d 827, 839 (5th Cir.), *cert. denied,* — U. S. —, 100 S. Ct. 82 (1979). This, of course, is not true of Section 6(b)(1), which provides "detailed requirements and limitations relating to the Commission's authority to disclose information."[66]

CFA is simply wrong in contending that Section 6(b)(1) cannot come within Exemption 3 because it does not exempt but rather "authorizes" disclosure (CFA Brief at 23). Section 6(b)(1) makes clear that inaccurate or misleading information identifying particular manufacturers may not be released; the CPSC's sole options are to comply with Section 6(b)(1) or to withhold the information from the public. The fact that the specific word "withhold" does not appear in Section 6(b)(1) in no way detracts from this conclusion.[67]

Further, it is not true that Section 6(b)(1) fails to establish standards to be applied in determining whether information should be withheld (*see* CFA Brief at 24). There are three such standards clearly delineated in the statute. The CPSC must "take reasonable steps to assure" (1) that the information is "accurate," (2) that disclosure will be "fair in the circumstances," and (3) that disclosure will be "reasonably related to effectuating the purposes of [the CPSA]."

65. H. R. Rep. No. 880 (Part I), 94th Cong., 2d Sess. 23, *reprinted in* [1976] U. S. Code Cong. & Ad. News 2183, 2205.

66. H. R. Rep. No. 1153, 92d Cong., 2d Sess. 31 (1972).

67. For example, in **Seymour v. Barabba,** 559 F. 2d 806, 808 (D. C. Cir. 1977), 13 U. S. C. § 9 was held to come within Exemption 3 even though it does not refer to "withholding" or "disclosing" but merely provides that census information is to be used only for the statistical purposes for which it was supplied.

Even CFA does not appear to challenge the specificity of the first standard, *i.e.*, that the information be "accurate." Instead, CFA argues that the requirement that the CPSC "take reasonable steps to assure" that the three standards for disclosure are met "infects each of [them] with the imprecision the 1976 amendment sought to eliminate" (CFA Brief at 26-27). To the contrary, juries and courts have long been entrusted with the task of determining what is "reasonable" behavior and have been successful in doing so.

CFA then asserts that the third standard—whether the information is "reasonably related to effectuating the purposes" of the CPSA—is "nearly beyond measure" (CFA Brief at 27). If this statement were true, however, the CPSC could never comply with Section 6(b)(1) even with respect to so-called "affirmative" disclosures. The fact is that a rational determination whether disclosure is "reasonably related to effectuating the purposes" of the CPSA can easily be made by comparing those purposes (enumerated in 15 U. S. C. § 2055(b)) with the purpose that would be served by disclosure of the information in question (*see* A. 121).[68]

Section 6(b)(1) thus stands in stark contrast to the nebulous withholding provisions that were noted by the Conference Committee as not coming within the new

68. *See, e.g.*, **Lee Pharmaceuticals v. Kreps,** 577 F. 2d 610 (9th Cir. 1978), *cert. denied,* 439 U. S. 1073 (1979) (cited in CFA Brief at 28), where a provision requiring that patent application information be kept in confidence "unless necessary to carry out the provisions of any Act of Congress or in such special circumstances as may be determined" (35 U. S. C. § 122) was found to be an Exemption 3 statute.

Determining whether a particular disclosure would be "fair in the circumstances" should pose no greater problem (*see* A. 120).

language of Exemption 3.[69] Section 6(b)(1) is far more like Section 142(a) of the Atomic Energy Act of 1954, 42 U. S. C. § 2162(a), which directs that information be released only if it "can be published without undue risk to the common defense and security" and was explicitly acknowledged as satisfying the new language of Exemption 3.[70] As described in **American Jewish Congress v. Kreps,** 574 F. 2d 624, 629 (D. C. Cir. 1978), this statute and other examples given in the legislative history "imply a congressional sense that the crucial distinction lay between statutes that in some manner *told* the official what to do about disclosure and those that did not significantly inform his discretion in that regard" (footnote omitted) (emphasis in original).

69. *See* H. R. Rep. No. 1441, 94th Cong., 2d Sess. 24-25, *reprinted in* [1976] U. S. Code Cong. & Ad. News 2244, 2260-61.

Unlike the statute before the Court here, section 1104 of the Federal Aviation Act, 49 U. S. C. § 1504, permits the withholding of information if its release "would adversely affect the interests of [a] person and is not required in the interest of the public." Section 1106 of the Social Security Act, 42 U. S. C. § 1306, similarly prohibits disclosure of a wide range of Social Security information except as the Secretary of HEW or the Secretary of Labor "may by regulations prescribe."

The statute that was involved in **Mobil Oil Corp. v. FTC,** 406 F. Supp. 305 (S. D. N. Y. 1976) (cited in CFA Brief at 23), allows the agency almost unlimited discretion to disclose any information it has obtained "as it shall deem expedient in the public interest." 15 U. S. C. § 46(f). Like the statutes cited in the amendment's legislative history, this provision in the words of the District Court, "vests virtually 'unfettered and unguided power' in the [agency] to determine what information to disclose" (Pet. App. 91a n. 22, *quoting* **Stretch v. Weinberger,** 495 F. 2d 639, 640 (3d Cir. 1974)).

70. *See* H. R. Rep. No. 880 (Part I), 94th Cong., 2d Sess. 23, *reprinted in* [1976] U. S. Code Cong. & Ad. News 2183, 2205.

Similarly, the statute found to satisfy Exemption 3 in **Chamberlain v. Kurtz,** 589 F. 2d 827 (5th Cir.), *cert. denied,* — U. S. —, 100 S. Ct. 82 (1979), permits the Secretary of the Treasury to withhold information whose disclosure will "seriously impair Federal tax administration." 26 U. S. C. §§ 6103(c), (e)(6).

Section 6(b)(1) very clearly tells the CPSC "what to do" about disclosure of information that identifies a manufacturer, and it makes no distinction between disclosures in response to FOIA requests and disclosures "initiated" by the agency. In either case, the agency must take reasonable steps to assure that the information is accurate and that release will be fair in the circumstances and reasonably related to the purposes of the CPSA. As stated by the Court of Appeals, "[t]he standards . . . are sufficiently definite that they provide a reviewing Court with criteria to measure the Commission's compliance with Congress's intent" (Pet. App. 67a).[71]

In **American Jewish Congress v. Kreps,** *supra,* the court ruled that a non-disclosure statute comes within Exemption 3 if it "is the product of Congressional appreciation of the dangers inherent in airing particular data and incorporates a formula whereby the administrator may determine precisely whether disclosure in any instance would pose the hazard that Congress foresaw." 574 F. 2d at 628-29. Not only does Section 6(b)(1) provide the "formula," but here, of course, as noted by the Court of Appeals (*see* Pet. App. 65a), disclosure of the information to the requesters would indeed "pose the hazard" that led Congress to enact Section 6(b)(1) (*see* pp. 28-35, *supra*). For both these reasons, the provision comes within Exemption 3 and the information therefore need not be disclosed.

71. The District Court also noted that "susceptib[ility]" of the standards to "effective judicial review" (Pet. App. 90a). The only commentator who appears to have addressed the issue has concluded that Section 6(b)(1) satisfies the Exemption 3 requirements on similar grounds. *See* Note, **The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act,** 76 Colum. L. Rev. 1029, 1045 & n. 100 (1976).

V.

The CPSC's Litigation-Inspired "Administrative Interpretation" of Section 6(b)(1) Should Be Given No Weight and Is Not Supported by the Subsequent Legislative History Cited by the Agency.

Having failed to support its position in the language or contemporaneous legislative history of Section 6(b)(1) or to demonstrate that there is any insoluble conflict between Section 6(b)(1) and the FOIA, the CPSC makes two other arguments for reversal of the decisions below. First, it contends that this Court should defer to its "long-standing interpretation" that the provision applies only to disclosures "initiated" by the agency (CPSC Brief at 40). Second, it asserts that "later legislative events confirm the view that the procedural requirements of Section 6(b)(1) are inapposite in the FOIA setting" and that "when Congress revisited and amended the statute, it . . . embraced the agency's position" (CPSC Brief at 14, 15; *see also* CFA Brief at 18-20). These two arguments are utterly devoid of merit.

A. The CPSC's Belated and Self-Serving "Interpretation" of Section 6(b)(1) Is Not Entitled to Any Weight.

The CPSC asserts that it "has consistently construed Section 6(b)(1) to apply only to agency-generated disseminations of product safety information and not to FOIA disclosures"; that "[t]his view is formalized in proposed Commission regulations"; and that "[a]n agency's interpretation of its own enabling legislation should not be overturned unless there are 'compelling indications' that the interpretation is wrong" (CPSC Brief at 40). Aside from the fact that the courts below correctly found "compelling indications" in logic and in the language and his-

tory of Section 6(b)(1) that Congress did not intend the provision to apply only to disclosures that the CPSC "initiates," the truth of the matter is that the CPSC has no "longstanding interpretation" of the provision.

The CPSC did not reach its strained reading of Section 6(b)(1) until it met in executive session on October 6, 1975 (A. 169-70)—over six months *after* it had decided to release the information involved in this case and more than two months *after* the manufacturers' preliminary injunction motions had been fully briefed and argued before the District Court. Further, it was not until October 5, 1977—two days before the CPSC filed its brief opposing the manufacturers' motions for summary judgment (A. 7) and two years after the District Court ruled that disclosure of the "TV-related accident" information would violate Section 6(b)(1) (A. 114-21)—that the CPSC's proposed rules were published. *See* 42 Fed. Reg. 54,304 (1977).[72]

Not surprisingly, when the CPSC's "administrative interpretation" was presented to Judge Latchum in October of 1977, he refused to accord any significant weight to it, noting that it "did not arise until after the present controversy began" (Pet. App. 81a). This refusal was completely correct. As this Court stated over thirty years ago, the deference to be given an interpretative rule depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." **Skidmore**

72. Aside from an extension of the time period for filing comments (*see* 42 Fed. Reg. 60,752 (1977)), the CPSC has published nothing with respect to the proposed rules since October 5, 1977, the date they initially appeared in the Federal Register.

v. Swift & Co., 323 U. S. 134, 140 (1944).[73] The CPSC's "interpretation" of Section 6(b)(1) is no more than a litigation tactic and clearly fails the **Skidmore** test, which remains the standard by which interpretative rules are measured. *See, e.g.*, **SEC v. Sloan**, 436 U. S. 103, 117-18 (1978); **Adamo Wrecking Co. v. United States**, 434 U. S. 275, 287 n. 5 (1978); **Batterton v. Francis**, 432 U. S. 416, 425 n. 9 (1977).

In **Davies Warehouse Co. v. Bowles**, 321 U. S. 144, 156 (1944), this Court recognized that the formulation of a position for purposes of litigation is not the type of careful consideration by an administrative agency that is ordinarily given judicial deference:

> "The administrative ruling in this case was no sooner made than challenged. We cannot be certain how far it was determined by the considerations advanced, mistakenly as we think, in its defense of this case. It has hardly seasoned or broadened into a settled administrative practice."

See also **International Brotherhood of Teamsters v. Daniel**, 439 U. S. 551, 569 (1979). This case is even more compelling than **Davies**, since the CPSC's determination to disclose the information was challenged first, and the "longstanding" and "consistent" "interpretation" was adopted second.

73. The interpretation cannot be considered "substantive" as opposed to "interpretative" within the meaning of **Skidmore** because it was not promulgated pursuant to the exercise of delegated legislative power and in accordance with the procedures established by the APA. *See* **Chrysler Corp. v. Brown**, 441 U. S. 281, 301-02 (1979), and the Court of Appeals' discussion of this point (Pet. App. 31a-32a).

In addition to being litigation-inspired, the CPSC's October 5, 1975 "administrative interpretation" of Section 6(b)(1) is not supported by any opinion or statement of the agency explaining the reasons for its adoption. Moreover, even if the rationales for the CPSC's position that have been articulated by counsel in the context of this litigation had been voiced by the agency,[74] they would not be entitled to any special weight because they do not involve matters in which the agency has any expertise that would justify judicial deference. *See, e.g.*, **International Brotherhood of Teamsters v. Daniel,** 439 U. S. 551, 566 n. 20 (1979). The CPSC's "interpretation" of Section 6(b)(1) is based primarily on its desire to effectuate not the purposes of the CPSA, but rather what it perceives to be the purposes of the FOIA.[75] However, "[a]n agency interpretation involving, at least in part, the provisions of [an act of general application] does not carry the weight, in ascertaining the intent of Congress, that an interpretation by an agency 'charged with the responsibility' of administering a particular statute does." **United States v. Florida East Coast Ry.,** 410 U. S. 224, 236 n. 6 (1973); *see* **Alaska Steamship Co. v. United States,** 290 U. S. 256, 264 (1933); *see also* **IT&T v. International Brotherhood of Electrical Workers,** 419 U. S. 428, 441 (1975).

It is clear that this case does not involve an agency's long-standing contemporaneous construction of its own

74. Counsel's briefs cannot compensate for the lack of any reasoned opinion at the administrative level. **Investment Co. Inst. v. Camp,** 401 U. S. 617, 628 (1971).

75. This is evident from the arguments advanced by the CPSC in this litigation (*see, e.g.*, Transcript of Oral Argument in the Court of Appeals, at 5-7, 11-13) and also from the preface to the agency's proposed rules governing the applicability of Section 6(b)(1), which states that applying the provision to FOIA requests "would thwart the purposes of the FOIA." 42 Fed. Reg. 54,305 (1977).

enabling act. The interpretation came several years after enactment of the CPSA[76] and focuses not on the CPSA but rather on the FOIA. Additionally, as the District Court recognized, the applicability of Section 6(b)(1) to disclosures made in response to FOIA requests is "a narrow legal issue" to be resolved only once, and it is not the sort of issue as to which the agency can offer any peculiar expertise (Pet. App. 82a).

In any event, the CPSC may not, through the guise of adopting an "administrative interpretation" of Section 6(b)(1), obtain authority to disclose information that has been denied it by Congress. *See* **Southeastern Community College v. Davis,** — U. S. —, —, 99 S. Ct. 2361, 2369-70 (1979); **SEC v. Sloan,** 436 U. S. 103, 118 (1978).[77] Since the CPSC's "interpretation" of Section 6(b)(1) is contrary to "the clear meaning of [the] statute, as revealed by its language, purpose and history." (**International Brotherhood of Teamsters v. Daniel,** 439 U. S. 551, 566 n. 20 (1979)), it should be rejected.

76. *See, e.g.*, **Midway Co. v. Eaton,** 183 U. S. 602, 609 (1902) (administrative interpretation made three years after passage of the statute not "exactly contemporaneous"); **Brennan v. General Tel. Co.,** 488 F. 2d 157, 160 (5th Cir. 1973) (administrative interpretation made 29 months after passage of the statute not contemporaneous). In contrast, the cases cited by the CPSC (*see* CPSC Brief at 40-41) involved statutes that had been in existence for a number of years and agency interpretations adopted within a year after the statute's enactment (**Zenith Radio Corp. v. United States,** 437 U. S. 443, 450 (1978)) or even before the statute's enactment (**NLRB v. Bell Aerospace Co.,** 416 U. S. 267, 275, 285 (1974); **Norwegian Nitrogen Prod. Co. v. United States,** 288 U. S. 294, 311-15 (1933)).

77. An agency's authority to issue interpretative rulings cannot be used as a means of expanding its substantive powers. **Federal Maritime Comm'n v. Seatrain Lines, Inc.,** 411 U. S. 726, 745 (1973); *see also* **Dow Chem. Co. v. EPA,** 605 F. 2d 673, 682 (3d Cir. 1979).

B. Subsequent Legislative History and Amendments to Other Portions of the CPSA Do Not Demonstrate Congressional Approval of the CPSC's "Interpretation" of Section 6(b)(1).

The CPSC asserts that "[l]egislative developments subsequent to passage of the Act confirm that Congress did not intend Section 6(b)(1) to apply to disclosures other than those the Commission undertakes as part of its statutory responsibilities" (CPSC Brief at 37). Of course, subsequent legislative history is, as expressed by the Court of Appeals, "a hazardous basis for inferring the intent of an earlier one" (Pet. App. 55a, *quoting* **United States v. Price,** 361 U. S. 304, 313 (1960)). Certainly, such subsequent history "cannot substitute for a clear expression of legislative intent at the time of enactment." **Southeastern Community College v. Davis,** — U. S. —, —, 99 S. Ct. 2361, 2370 n. 11 (1979). Moreover, it can only be entitled to consideration when it "represents the will of Congress as a whole" and "constitute[s] subsequent 'legislation' such as this Court might weigh in construing the meaning of an earlier enactment." *Id.; accord,* **Illinois Brick Co. v. Illinois,** 431 U. S. 720, 733-34 n. 14 (1977).

Section 6 of the CPSA has *never* been amended and its intent has *never* been the subject of a later Congressional enactment. Indeed, Congress as a whole has not considered the provision since it was originally enacted. As recognized by the Court of Appeals, the isolated pieces of subsequent legislative history offered by the CPSC in support of its position do not demonstrate Congressional approval of the CPSC's "interpretation" of Section 6(b)(1).

1. The CPSC first relies upon a colloquy between Richard O. Simpson, then Chairman of the CPSC, and Representative John E. Moss during oversight hearings in 1976 (*see* CPSC Brief at 37-38). In this colloquy, Chairman Simpson mentioned the instant litigation and said that the CPSC interpreted Section 6(b)(1) of the CPSA to be inapplicable to FOIA requests; Representative Moss then responded, "As the primary author of both acts, I am inclined to agree with you." [78] In the words of the Court of Appeals, "notwithstanding Representative Moss' claimed authorship of the CPSA, it should be recognized that he was not a sponsor of the bill that provided that legislation with its provisions governing information disclosure" (Pet. App. 58a). Indeed, the less restrictive disclosure provisions favored by Representative Moss were rejected by the House Committee in favor of those that were eventually enacted in Section 6(b)(1) (*see* p. 33 n. 39, *supra*).

Moreover, as the Court of Appeals also recognized, "[i]t goes without saying that the views of a single member of Congress concerning the appropriate interpretation of a statutory provision passed some years ago earlier are not dispositive" (Pet. App. 58a). Such isolated *post hoc* observations are generally given little, if any, weight in statutory construction. *E.g.,* **Quern v. Mandley,** 436 U. S. 725, 736 n. 10 (1978); **City of Los Angeles Department of Water & Power v. Manhart,** 435 U. S. 702, 714 (1978); **United States v. Philadelphia National Bank,** 374 U. S. 321, 348-49 (1963); **United States v. UMW,** 330 U. S. 258, 282 (1947).[79]

78. Oversight Hearings, *supra* p. 17 n. 12, at 7-8.

To be "inclined to agree" is hardly a clear expression even of a single Congressman's view.

79. The isolated post-enactment statement of a Congressman who favored a provision other than the one that was enacted is a far cry from remarks made during Congressional debates by the sponsors of proposed amendments that later became law such as

The expressed views of individual members of Congress are especially non-persuasive when they are made in the absence of accompanying legislation and are not brought to the attention of Congress as a whole for approval or rejection. *See, e.g.*, **Regional Rail Reorganization Act Cases,** 419 U. S. 102, 132 (1974); **United States v. Wise,** 370 U. S. 405, 411 (1962). Indeed, in **Wise** the interpretation that was rejected was expressed by Congressmen who unsuccessfully proposed legislation intended to correct their erroneous reading of the prior statute. This is factually quite close to the present case, where Chairman Simpson informed Representative Moss of this litigation and requested Congress to clarify the language that Judge Latchum had allegedly misconstrued. In response to a request from Representative Moss, a proposed amendment was submitted by Chairman Simpson but was never even reported out of committee, a fact that both courts below correctly considered significant (*see* Pet. App. 58a, 81a n. 9).[80] *See* **NLRB v. Robbins Tire & Rubber Co.,** 437 U. S. 214, 230 n. 11, 234 (1978). Obviously, the failure to report out the amendment should be given far more weight than a single Congressman's offhand remarks.

79. (Cont'd)
were involved in the cases cited by the CPSC (*see* CPSC Brief at 38-39 n. 18). *See, e.g.*, **Chrysler Corp. v. Brown,** 441 U. S. 281, 311 (1979); **Simpson v. United States,** 435 U. S. 6, 13 (1978); **Schwegmann Bros. v. Calvert Distillers Corp.,** 341 U. S. 384, 394-95 (1951).

80. This scenario is completely different from those presented in the cases cited by the CPSC (*see* CPSC Brief at 38), where the legislation proposed by the agency was favorably reported by both Houses but not enacted prior to adjournment (**Wong Yang Sung v. McGrath,** 339 U. S. 33, 47 (1950)) and where industry specifically requested that Congress withhold legislative action pending an administrative resolution of the problem (**American Trucking Ass'n v. Atchison, Topeka & Santa Fe Ry.,** 387 U. S. 397, 417 (1967)). Even in these cases this Court indicated that there was no basis for finding later Congressional approval of the agency's position. Yet that is precisely what the CPSC argues should be inferred here.

2. Both the CPSC and CFA (*see* CPSC Brief at 38-42, CFA Brief at 18-20) also contend that the legislative history of the Consumer Product Safety Commission Improvements Act of 1976 ("CPSCIA")[81] evidences Congressional approval for the CPSC's interpretation of Section 6(b)(1) to exclude responses to FOIA requests. This is clearly incorrect.

Among other things, the CPSCIA added subsection (e) to Section 29 of the CPSA. Section 29(e) authorizes the CPSC to make accident reports that it has generated available to other federal and state agencies but prohibits release of the reports by those other agencies "unless . . . the Commission has complied with the applicable requirements of [Section 6(b)]." 15 U. S. C. § 2078(e). This provision actually cuts against, not in favor of, the CPSC's position in this litigation, since it reemphasizes the importance that Congress attached to the disclosure limitations of Section 6(b)(1) and the need to assure that the protections of that provision would not be lost through a transfer of information to another agency.

Apparently recognizing that the language of Section 29(e) is not helpful to them, the CPSC and CFA point to the following statement in the Conference Report on the CPSCIA:

> "The requirement that the Commission comply with section 6(b) prior to another Federal agency's public disclosure of information obtained under the Act is not intended by the conferees to supersede or conflict with the requirements of the Freedom of Information Act (5 U. S. C. 552(a)(3) and (a)(6)). The former relates to public disclosure initiated by the Federal

81. Pub. L. No. 94-284, 90 Stat. 510 (1976).

> agency while the latter relates to disclosure initiated by a specific request from a member of the public under the Freedom of Information Act." [82]

Neither court below found this statement to be persuasive evidence of approval of the CPSC's "interpretation" of Section 6(b)(1) by even the CPSCIA Conference Committee, let alone by the 1976 Congress as a whole (*see* Pet. App. 56a, 84a). Indeed, the District Court reasoned that, by referring to the specific provisions of the FOIA establishing the time frame for responding to FOIA requests (*see* pp. 38-39, *supra*), the Conference Committee was merely noting "the need for some sort of accommodation between the different time restraints imposed by Section 6(b) and the FOIA" (Pet. App. 84a).[83]

Moreover, as the Court of Appeals correctly noted (*see* Pet. App. 55a), the question whether Section 6(b)(1) applies to disclosures made in response to FOIA requests is not addressed in the Report of the House Committee that drafted the CPSCIA,[84] or in the debates on either the House Report or the Conference Report.[85] Nor was the

82. H. R. Rep. No. 1022, 94th Cong., 2d Sess. 27, *reprinted in* [1976] U. S. Code Cong. & Ad. News 1017, 1029.

83. The District Court also emphasized that "[n]otably, the statement does not make Section 6(b) altogether inapplicable in the face of an FOIA request, as the Commission would do" (Pet. App. 84a). Similarly, the Court of Appeals noted that the language of the Conference Committee was inconsistent with the fact that "section 25(c) of the CPSA, by its terms, applies the requirements of section 6(b)(1) to FOIA requests for accident investigation reports" (Pet. App. 57a).

84. H. R. Rep. No. 325, 94th Cong., 1st Sess. 18 (1975).

85. *See* 121 Cong. Rec. 33,691 (1976) (House approval of the House Report); 122 Cong. Rec. 10,811 (1976) (House approval of the Conference Report); *id.* at 11,586 (Senate approval of the Conference Report).

question treated in Section 29(e) itself, which was described by Chairman Simpson as "a minor thing to allow the Commission to cooperate with the states" and was to be given "a narrow interpretation." [86] The Court of Appeals thus concluded:

> "Given our view that the legislative history of section 6(b)(1) itself strongly supports an inference that the Commission's interpretation of that provision conflicts with the intent of the Congress that enacted it, we are unwilling to accept the isolated, and in our view erroneous, conclusion of a later congressional committee as persuasive authority to the contrary" (Pet. App. 56a).

This conclusion is clearly correct. Even the cases cited by CFA (*see* CFA Brief at 19) stand for the proposition that the only subsequent legislative development that may be given substantial weight is the Congressional adoption of "specific statutory language that was thought to clarify the meaning of an earlier statute." **Illinois Brick Co. v. Illinois**, 431 U. S. 720, 734 n. 14 (1977).[87] The CPSC asserts that "[b]y incorporating Section 6(b) by reference into Section 29(e) . . . Congress necessarily

86. Consumer Product Safety Act Amendments: Hearings on H. R. 5361, H. R. 5601, *et al.* Before the Subcomm. on Consumer Protection & Finance of the House Comm. on Interstate & Foreign Commerce, 94th Cong., 1st Sess. 180 (1975).

87. The leading cases in this area are **Red Lion Broadcasting Co. v. FCC**, 395 U. S. 367, 381 (1969), and **Federal Hous. Admin. v. Darlington, Inc.**, 358 U. S. 84, 90 (1958). The statutes involved in those cases were explicitly interpretative of earlier legislation *See* 47 U. S. C. § 315(a); 12 U. S. C. § 1731b(a). Similarly, the statute involved in **Mount Sinai Hosp., Inc. v. Weinberger**, 517 F. 2d 329, 343 (5th Cir. 1975), *cert. denied*, 425 U. S. 935 (1976), was found to be necessarily interpretative since otherwise it would have been "pointless and ineffectual." *See also* **Glidden Co. v. Zdanok**, 370 U. S. 530, 541 (1962).

'interpret[ed] the scope of section 6(b)'" (CPSC Brief at 42 n. 20). That is not so. In contrast to interpretative legislation, Section 29(e) merely refers to Section 6(b) in declaring its applicability in a new area. In no way does it set forth the intent of Congress in enacting the earlier provision. As in **Illinois Brick**, the statement in the Conference Report in 1976 cannot control over the indications of Congressional intent in enacting Section 6(b)(1) in 1972.

3. The CPSC also contends that since Congress "has revisited the Act and left the [agency] practice untouched," it must be viewed as having approved that practice (CPSC Brief at 41, *quoting* **Saxbe v. Bustos,** 419 U. S. 65, 74 (1974)). However, the very cases cited to support this proposition make clear that the inference of Congressional approval is not automatic but depends on whether the interpretation "plainly has not escaped public or legislative notice," **United States v. Rutherford,** — U. S. —, —, 99 S. Ct. 2470, 2476 n. 10 (1979), and on such other factors as the length of time that the agency has followed the construction and the extent to which the overall statutory scheme has been amended. *See* **Andrus v. Allard,** — U. S. —, —, 100 S. Ct. 318, 322-23 (1979); **Board of Governors v. First Lincolnwood Corp.,** 439 U. S. 234, 247-48 nn. 12-13 (1978); **Saxbe v. Bustos,** 419 U. S. 65, 74 (1974). The CPSC's "administrative interpretation" of Section 6(b)(1) is hardly long-standing or even well-known.[88] Thus, the addition on one occasion of unrelated

88. There clearly was no "considerable public controversy" about the issue of Section 6(b)(1)'s applicability to FOIA requests in 1976 even remotely comparable to what was involved in **Rutherford.** Indeed, the CPSC's interpretation of the provision was not made public until *after* the enactment of the CPSCIA and still has not been finalized or placed in the Code of Federal Regulations. *See* p. 52 n. 72 *supra.*

amendments to the overall scheme of the CPSA cannot establish Congressional approval of that interpretation.

More importantly, however, if Congressional knowledge of the CPSC's interpretation of Section 6(b)(1) in 1976 is to be presumed, then it also must be presumed that Congress had knowledge of Judge Latchum's preliminary injunction opinion (issued October 23, 1975), in which that interpretation was emphatically rejected (*see* A. 115-16).[89] Indeed, "judicial" as well as "administrative" interpretations are discussed in **Rutherford.** — U. S. at —, 99 S. Ct. at 2476 n. 10; *accord,* **Lorillard v. Pons,** 434 U. S. 575, 580-81 (1978).

At any event, it is clear that the situation presented by this case offers far less reason to find Congressional adoption of an administrative interpretation than the facts this Court found insufficient in **SEC v. Sloan,** 436 U. S. 103 (1978). In **Sloan,** a Congressional Committee had recognized and explicitly approved the SEC's prior administrative construction of a provision of the Securities Act of 1934 in the course, thirty years later, of reenacting the provision and expanding its application to a new sphere. The Court held that it would not presume "general congressional awareness of the Commission's construction based upon only a few isolated statements in the thousands of pages of legislative documents." *Id.* at 120-21. These words are equally applicable here. The CPSC has not demonstrated any widespread Congressional knowledge of the CPSC's "administrative interpre-

89. This is particularly necessary in light of the fact that the Subcommittee ignored the CPSC's proposed amendment seeking to overrule the District Court's preliminary injunction holding through the insertion of an express exemption from Section 6(b)(1) for responses to FOIA requests (*see* p. 58 *supra*).

tation" of Section 6(b)(1) nor the existence of interpretative legislation declaring the intent of the 1972 Congress in enacting the provision. Thus, the argument that the Conference Report requires this Court to defer to the CPSC's interpretation of Section 6(b)(1), should, like the other arguments advanced by the CPSC, be categorically rejected.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 79-521

In the Supreme Court of the United States

OCTOBER TERM, 1979

CONSUMER PRODUCT SAFETY COMMISSION, ET AL.,
PETITIONERS

v.

GTE SYLVANIA, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

1. Respondents' brief begins with a lengthy and highly critical description of the Consumer Product Safety Commission's investigation into possible safety hazards associated with television receivers (Resp. Br. 2-8). In painting its negative picture, however, the brief conveniently ignores the single feature of the disputed "TV-related accident" reports that is most salient to the present controversy. The consumer complaints submitted by television manufacturers to the Commission in response to its requests are not business data or records prepared by the manufacturers in the course of their business activities; they are reports initially submitted to the manufacturers by members of the public who have experienced difficulties with the manufacturers' products. Similar reports concerning various consumer products are frequently submitted by the public directly to the

Commission, and there is no evidence in the record that persons reporting TV-related accidents to manufacturers have any objection to the submission of their information to the Commission or to the Commission's subsequent release of the accident reports to a Freedom of Information Act requester.

Respondents have, of course, asserted (Resp. Br. 3, 7) that the accident reports are confidential and that they are exempt from mandatory disclosure under the FOIA because they fall within the statutory category of "trade secrets and commercial or financial information * * * [that is] privileged or confidential" (5 U.S.C. 552(b)(4)). But neither the district court nor the court of appeals has accepted respondents' assertions, and respondents cannot convert the accident reports into trade secrets or confidential business data simply by applying those labels.

If the Commission prevails in this Court and Section 6(b)(1) of the Consumer Product Safety Act does not modify the Commission's mandatory duty of disclosure under the FOIA, the appropriate course would be a remand for consideration of respondents' arguments that release of the "TV-related accident" reports violates the Trade Secrets Act, 18 U.S.C. 1905, or is an abuse of agency discretion under the Administrative Procedure Act, 5 U.S.C. 706(2)(A), because it involves the unjustified dissemination of material exempt from mandatory disclosure under Exemption 4 of the FOIA, the so-called "trade secret exemption." See 5 U.S.C. 552(b)(4). Until that time, however, it ill befits respondents to seek a resolution of the current dispute on the basis of their own unsupported representations that the documents in question are confidential.

2. Respondents contend vigorously (Resp. Br. 15-22) that "there is no rational way to distinguish between so-called 'affirmative' and 'passive' disclosures of information by the [Commission]" (*id.* at 22). The thrust of this argument is unclear. Respondents may mean that they do not understand the classifications advanced by the Commission and the sorts of disclosures falling in each category. The distinction is readily apparent. On the one hand, the Commission may issue reports, analyses, press releases, research studies, or other material that it represents as reflecting its own conclusions about the possible hazards associated with particular products. In such instances, the Commission is likely to give the materials a wide distribution in an effort to educate the consuming public about what the government has learned. On the other hand, the Commission may release specific documents to a person who requests them under the FOIA. In such instances, the Commission would not release the materials at all in the absence of a request, the Commission's distribution is limited to the requester, and the Commission makes no representation whatever, either express or implied, concerning its views on the accuracy or reliability of the documents requested.[1]

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[1]Respondents erroneously assert (Resp. Br. 21) that, if the Commission's distinction between disclosures under the FOIA and other disclosures undertaken at the Commission's own initiative and with the Commission's endorsement is accepted, it will permit the Commission "to disclose inaccurate or misleading information identifying a manufacturer any time it wishe[s] merely by issuing an accompanying statement that it [is] not vouching for or 'endorsing' the accuracy of the information." This argument ignores the mandatory nature of an agency's duty under the FOIA. When the Commission or any other government agency responds to a FOIA request, it does so not because it "wishes" to respond but because the FOIA compels it to respond. A release of information under the FOIA does not occur at the agency's initiative, much less at the agency's whim.

This Court may decide that the distinction between "affirmative" and "passive" disclosures cannot bear the significance that the Commission ascribes to it, but the distinction is surely not artificial. It is the same distinction noted by Professor Ernest Gellhorn in a law review article on which respondents rely (Resp. Br. 20). See Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 Harv. L. Rev. 1380, 1421-1422 (1973). The article states (*ibid.*) (footnote omitted):

> Before proposing methods for controlling the use of agency publicity, one must distinguish such controls from agency information practices that permit public access to agency records in accordance with the Freedom of Information Act. The latter involves [*sic*] a question of the availability of government information to the public. Agency publicity, on the other hand, involves affirmative action on the part of an agency or its personnel to bring information or activities to the attention of the public.[2]

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[2]Respondents attempt (Resp. Br. 22 & n.17) to distinguish *Pierce & Stevens Chemical Corp.* v. *CPSC*, 585 F. 2d 1382 (2d Cir. 1978), on the ground that in that case the requested inspection reports were generated by the government whereas here the information requested was obtained from the television manufacturers. Although respondents suggest that the circumstances in *Pierce & Stevens* made it easier for the court of appeals to sustain the Commission's reading of Section 6(b)(1), the factual distinctions between the two cases cut in precisely the opposite direction. If anything, the inspection reports at issue in *Pierce & Stevens* were more likely to be thought to represent the government's views than the unevaluated consumer accident reports involved here. Nonetheless, the court of appeals in *Pierce & Stevens* concluded correctly, in the Commission's view that, because no agency approval or endorsement attaches to materials disclosed under FOIA, the procedural requirements of Section 6(b)(1) do not apply in that context.

The other possible meaning of respondents' objection to the distinction between "affirmative" and "passive" disclosures is that, although the distinction is understood and acknowledged in theory, it is without practical importance because a release of information by the Commission has the same or nearly the same effect whether the Commission acts on its own initiative or in response to a FOIA request from a member of the public. Predictions concerning the probable consequences of releases of information that have not yet occurred are unavoidably speculative, but respondents' contention seems inconsistent with both experience and common sense. Respondents strain credulity when they suggest that the release to a FOIA requester of consumer product complaints obtained by the Commission directly or indirectly from members of the public will have the same impact as a public announcement by the Commission that it has determined a particular product unsafe on the basis of a detailed inquiry. The accident reports in the present case were submitted to television manufacturers six to 11 years ago; in many if not most cases, they concern television models no longer on the market. The members of the public who sent the reports to the manufacturers did not purport to be experts in product safety; they merely recounted particular incidents involving the television sets they themselves owned. It is difficult to accept respondents' assertion that the release of such consumer complaints to a FOIA requester (even a requester who might distribute them more broadly) would have a practical effect indistinguishable from the Commission's dissemination of its own report on television safety.

3. Respondents' arguments concerning the statutory language and legislative history of the Consumer Product Safety Act (Resp. Br. 22-35) focus on the words "public disclosure" in Section 6(b)(1) and insist that those words must encompass releases of information under the FOIA. Respondents fail, however, to address the overall structure of the Act and its pervasive emphasis on the Commission's functions of collecting, analyzing, and distributing product safety information.

As we have explained at length in our main brief (Br. 15-23), Congress has directed the Commission to gather information and disclose it to the public, even if no one asks for the information. The Commission's statutorily prescribed role is to educate and warn consumers about possible safety hazards associated with particular products. The disclosure of information is thus an affirmative part of the Commission's duties, and it is such disclosures to which Section 6(b)(1) refers. When the Commission performs its statutory tasks, a representation of accuracy and reliability is implicit in its public disclosures about consumer products. By contrast, when the Commission simply complies with the FOIA and releases consumer complaints in response to a request, no such representation is expressed or implied. The Commission merely carries out a largely ministerial duty common to all government agencies and not specifically related to product safety.

In sum, the phrase "public disclosure" as it is used in Section 6(b)(1) cannot be understood outside the context of the Act as a whole and the purposes for which the statute was passed. The disclosures to which the phrase refers are the disclosures that the Commission was created to make, not the disclosures it makes under the FOIA in its capacity as one of many government agencies.

The foregoing argument is strongly supported by the fact that, although Congress has granted broad information gathering power to numerous other agencies,[3] all of which are covered by the FOIA, it has imposed the restrictions of Section 6(b)(1) only on the Commission, the only agency charged with the statutory responsibility of disseminating product safety information to the public. The implication is obvious. Section 6(b)(1) was needed not to prevent abuses under the FOIA (the FOIA's own exemptions and the Trade Secrets Act are adequate to that task, just as they are adequate with respect to other government agencies), but to ensure that, when the Commission proposes to release product safety information supported by the weight of governmental authority and the Commission's own endorsement, it will do so only after offering affected manufacturers a reasonable opportunity to comment and only after taking reasonable steps to assure that the information is accurate.

Respondents maintain (Resp. Br. 26-27), however, that Section 25(c) of the Consumer Product Safety Act, 15 U.S.C. 2074(c), demonstrates the congressional intent to require compliance with Section 6(b)(1) as a precondition to any release of information by the Commission under the FOIA. Section 25(c) demonstrates no such thing, and

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[3]The following statutes are examples of provisions conferring broad information gathering powers on government agencies: 15 U.S.C. 46(a), (b), 49 (Federal Trade Commission); 15 U.S.C. 78u (Securities and Exchange Commission); 29 U.S.C. 161(1), (2) (National Labor Relations Board); 29 U.S.C. 657(a)-(c) (Occupational Safety and Health Administration); 46 U.S.C. 826(a) (Federal Maritime Commission); 47 U.S.C. 409(e)-(h) (Federal Communications Commission); 49 U.S.C. 12(1)-(4) (Interstate Commerce Commission). None of these statutes is accompanied by a provision requiring that the agency ensure the accuracy of any information released under the FOIA.

Congress had no such intent. The meaning of Section 25(c)'s references to Section 6 becomes clear when the two statutory provisions are examined side by side.

Section 6 of the Act is entitled "Public disclosure of information" and is unrelated to the FOIA. Section 6(a)(1) emphasizes this independence by providing that nothing in the Act should be construed to *require* the Commission, in performing its statutory duties, to release information exempt from mandatory disclosure under the FOIA. Section 6(a)(2) does not refer to the FOIA at all but simply prohibits public disclosure by the Commission, at its own initiative, of information that "contains or relates to a trade secret or other matter referred to in [18 U.S.C. 1905] * * *."[4] Section 6(b) also does not refer to

[4]Respondents incorrectly assert (Resp. Br. 24 n.19) that the Commission conceded in its opening brief that Section 6(a)(2) applies to FOIA requests. No such concession was made at the pages cited by respondents or anywhere else in the brief. Section 6(a)(2), like the rest of Section 6, addresses only the problem of disclosures undertaken by the Commission at its own initiative and with its implicit or explicit "seal of approval." The subsection was added to the Act to reassure manufacturers and labelers that the statutory mandate in favor of public disclosures of product safety information by the Commission would not override the prohibitions of 18 U.S.C. 1905 and authorize the Commission to make disclosures of trade secrets or other protected information acquired by the agency in the performance of its information-gathering responsibilities. See H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. 31-32 (1972).

The inapplicability of Section 6(a)(2) in the FOIA context does not mean, of course, that the Commission may reveal trade secrets in response to FOIA requests whenever it chooses to do so. On the contrary, as this Court has recently made clear in *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 317-318 (1979), the Trade Secrets Act, 18 U.S.C. 1905, "place[s] substantive limits on agency action" under the FOIA. The Commission, therefore, like every other federal agency, must take account of the criminal prohibitions of Section 1905 before it proposes to release "trade secret" materials in response to a FOIA

the FOIA and, as the Commission has argued, establishes procedural rules for public disclosures originated by the Commission and bearing its imprimatur.

Section 25 of the Act, by contrast, is entitled "Private remedies." As the committee report cited by respondents shows (Resp. Br. 26 n.25), this Section was intended to prevent the Commission from denying FOIA requests for certain materials on the basis of any of the exemptions from mandatory FOIA disclosure that generally are preserved by Section 6(a)(1) of the Act. Section 25(c) requires the Commission to make available to the public two categories of information, notwithstanding any FOIA exemption that otherwise might be available. Those two categories are "any accident or investigation report made * * * by an officer or employee of the Commission" and "all reports on research projects, demonstration projects, and other related activities * * *." The reference to Sections 6(a)(2) and 6(b) in Section 25(c) was intended simply to make clear that, although the Commission is precluded from asserting any FOIA exemption with respect to the covered materials, it is not relieved of the obligation to comply with the requirements of Section 6 should it decide to make an affirmative public disclosure of any research report or any accident or investigation report prepared by a Commission employee. The opening phrase of Section 25(c)—"[s]ubject to sections 6(a)(2) and 6(b)"—is designed not, as respondents contend, to reflect the applicability of specified portions of Section 6 to

request. Accordingly, the inapplicability of Section 6(a)(2) in the FOIA context does not create any "loophole" authorizing the Commission to reveal trade secrets to a FOIA requester when it could not disseminate such information to the public through an affirmative disclosure of the kind treated in Section 6 of the Act.

certain FOIA requests, but to avoid any potential misimpression that the unavailability of the FOIA exemptions with respect to certain materials authorizes the Commission to make *affirmative* disclosures of those materials without complying with Section 6. Section 25(c) is thus completely consistent with the Commission's interpretation of Section 6 and does not create any internal contradiction of the kind purportedly identified by respondents.

4. Respondents reprimand (Resp. Br. 45-46 & n.62) the Commission for omitting from its opening brief a discussion of Exemption 3 of the FOIA (5 U.S.C. 552(b)(3)) and the relationship of that exemption to Section 6(b)(1). Such a discussion is unnecessary and indeed irrelevant in view of the Commission's argument that Section 6(b)(1) simply does not apply in the FOIA context. If that argument is rejected and the decision of the court of appeals is affirmed, the Commission will be required to follow the procedural steps prescribed by Section 6(b)(1) before releasing any information in response to a FOIA request. The delay and temporary withholding that will inevitably result from this requirement will, of course, not violate the FOIA. Stated another way, if this Court determines that Section 6(b)(1) applies in the FOIA context, the Court's decision will necessarily comprise a ruling that any departure from the disclosure provisions of the FOIA occasioned by the need to comply with Section 6(b)(1) will not be subject to attack under the FOIA.[5] The relevant inquiry, therefore, is not whether

[5]As we have explained in our opening brief (Br. 30-32 and n.13), a holding that Section 6(b)(1) does apply in the FOIA setting would raise several serious practical problems. If the number of FOIA requests is sufficiently large, the Commission would be unable, with its existing resources, to take the necessary "reasonable steps" to assure the accuracy of the requested materials. If the Commission simply denies some FOIA requests because of this inability, it would almost certainly be sued by some requesters, who could be expected to argue that the Commission has no choice but to undertake the investigation described in Section 6(b)(1). Similarly, if the Commission discovers, in the course of a Section 6(b)(1) inquiry, that certain requested material is probably inaccurate and denies the outstanding FOIA request on that ground, the requester may well commence a legal action challenging the Commission's authority to withhold information on the basis of Section 6(b)(1), which, on its face, contemplates disclosure rather than nondisclosure. These knotty problems can best be avoided by recognizing the correctness of the position taken by the Commission throughout this litigation, namely, that Section 6(b)(1) does not apply in the FOIA context.

Section 6(b)(1) "specifically exempt[s information] from disclosure" within the meaning of Exemption 3 of the FOIA but whether Congress intended the procedural protections of Section 6(b)(1) to govern the Commission's response to a FOIA request. The answer to the latter question is dispositive of the outcome in this case.

5. Respondents have been unable to explain away the Conference Committee Report accompanying the addition of Section 29(e) to the Act in 1976. Respondents' contentions in this regard are not entirely clear but it appears that, because the applicability of Section 6(b)(1) to FOIA requests is not discussed elsewhere in the legislative history of the 1976 amendments, respondents would simply ignore the Conference Committee's comments on the subject and would do so not only in connection with Section 6(b)(1) but even in connection with Section 29(e) itself. Respondents have offered no justification for this cavalier disregard of what is ordinarily considered the most useful and reliable component of a statute's legislative history.

The point made at the conclusion of the Commission's opening brief thus remains unanswered. If the information involved in this case had been given to another federal agency under Section 29(e), the Conference Committee Report makes clear that the other agency would be required to disclose the information in the event of a FOIA request (subject, of course, to possible FOIA exemptions) without any need for compliance by the disclosing agency or the Commission with Section 6(b)(1). Under respondents' interpretation of the Act, however, the Commission itself would be forced to satisfy Section 6(b)(1) before complying with the identical FOIA request. Congress could not have intended such an incongruous result, and the proper way to avoid the problem is not to ignore the 1976 Report but to follow it in applying both Sections 6(b)(1) and 29(e).

For these reasons and the reasons stated in the Commission's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

APRIL 1980

DOJ-1980-04

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-521

CONSUMER PRODUCT SAFETY COMMISSION, *et al.*,
Petitioners,

v.

GTE SYLVANIA, INC., *et al.*,
Respondents.

BRIEF FOR AMICUS CURIAE CONSUMER FEDERATION OF AMERICA

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BRIEF FOR AMICUS CURIAE CONSUMER FEDERATION OF AMERICA

INTEREST OF AMICUS CURIAE

With the consent of all parties, Amicus Consumer Federation of America, Inc., ("CFA") files this brief. Amicus, a non-profit corporation incorporated in 1968 in the State of New York, is a federation of more than 220 state, local and national organizations, representing more than 30 million American consumers. The largest consumer organization in the United States, CFA seeks to represent the viewpoints and interests of consumers before Congress, regulatory agencies, and the courts.

CFA has been active in a variety of court and agency proceedings pertaining both to consumer product safety and the rights of the public under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552. For example, CFA has participated in the development of Consumer Product Safety Commission ("CPSC" or "the Commission") regulations dealing with the reporting of consumer product safety hazards under section 15 of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. §2064 and recordkeeping requirements for consumer product safety complaints under section 6(b)(1) of the CPSA, 15 U.S.C. §2055(b)(1) ("section 6(b)(1)"), the statutory provision at issue in this case.

Additionally, CFA has directed substantial efforts toward proper implementation of the FOIA. CFA has sought to maximize public access to information possessed by federal agencies and has appeared as *amicus curiae* in various FOIA cases.[1] More specifically, CFA participated as *amicus curiae* in both this case below and in a Second Circuit case in which the court adopted the position which CFA asserts herein, *Pierce & Stevens Chemical Corp. v. Consumer Product Safety Commission*, 585 F.2d 1382 (1978). Since this case involves the interpretation of consumer protection legislation which affects citizen access under the FOIA, it is of particular interest to CFA and its members.

[1] *E.g.*, Chrysler Corp. v. Brown, 441 U.S. 281 (1978); Consumers Union v. Heimann, 589 F.2d 531 (D.C. Cir. 1978); Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977); Parkridge Hospital, Inc. v. Blue Cross and Blue Shield of Tennessee, 430 F. Supp. 1093 (E.D. Tenn. 1977).

ISSUES DISCUSSED BY AMICUS

I. Whether Congress intended the requirements of §6(b)(1) of the Consumer Product Safety Act to encompass only the affirmative publication of information by the Commission, or also to replace the elaborate disclosure scheme already established by the Freedom of Information Act.

II. Whether §6(b)(1), which requires the Commission to take "reasonable steps" to assure the accuracy of information to be disclosed and that disclosure is "fair" and "reasonably related to effectuating the purposes" of the Consumer Product Safety Act, establishes the particularized substantive criteria necessary to qualify as a withholding statute within the meaning of Exemption 3 of the Freedom of Information Act.

STATEMENT OF THE CASE

This case is before the Court on writ of certiorari to the United States Court of Appeals for the Third Circuit on petition of the United States Consumer Product Safety Commission. It represents the consolidation of twelve suits which were originally filed during April and May of 1975 by respondent television manufacturers to enjoin the implementation of a final decision of the Commission reached on March 28, 1975. The decision was to release television-related accident data obtained from the manufacturers to Consumers Union of the United States, Inc., and Public Citizen Health Research Group, pursuant to a request under the Freedom of Information Act, 5 U.S.C. §552. The suits were consolidated in the United States District Court for the District of Delaware.

In October of 1975 the district court granted respondents' motion for preliminary injunctive relief, *GTE Sylvania, Inc. v. Consumer Product Safety Commission,* 404 F.Supp. 352 (D. Del. 1975), and two years later issued an order permanently enjoining the release of the data. *GTE Sylvania, Inc. v. Consumer Product Safety Commission,* 443 F.Supp. 1152 (D. Del. 1977). In so doing, the district court rejected the Commission's argument to the contrary and found that section 6(b)(1) of the CPSA applies to releases of information made by the Commission pursuant to FOIA requests, and that in this instance the Commission had not fulfilled the section's requirements. The district court also concluded that section 6(b)(1) was a withholding statute within the meaning of Exemption 3 of the FOIA, 5 U.S.C. §552(b)(3) ("Exemption 3").

The Court of Appeals for the Third Circuit affirmed the district court's decision, *GTE Sylvania, Inc. v. Consumer Product Safety Commission,* 598 F.2d 790 (3d Cir. 1979), declining to follow the ruling of the United States Court of Appeals for the Second Circuit in *Pierce & Stevens Chemical Corp. v. Consumer Product Safety Commission,* 585 F.2d 1382 (2d Cir. 1978), that section 6(b)(1) applied to Commission-generated disclosures, but not to disclosures made in response to FOIA requests. The Third Circuit also agreed with the district court's conclusion that section 6(b)(1) was a withholding statute within the meaning of Exemption 3.

SUMMARY OF ARGUMENT

The Freedom of Information Act is a broad disclosure statute enacted to ensure the prompt availability of records in the government's possession. Section 6(b)(1), on the other hand, establishes requirements that are in direct conflict with the procedural and substantive provisions of the Freedom of Information Act.

Neither the language of section 6(b)(1) nor its legislative history support the Third Circuit's interpretation that the time-consuming procedural requirements of section 6(b)(1) are applicable to the mere release of records requested under the FOIA. Instead, Congress intended section 6(b)(1) to be applicable only to the affirmative, official publication of information by the Commission. In this way, Congress protected manufacturers from Commission-initiated publicity, yet left the disclosure scheme of the FOIA undisturbed.

The court of appeals further erred in holding that section 6(b)(1) is a withholding statute within the scope of Exemption 3 of the FOIA. Congress, in amending Exemption 3 in 1976, set out specific standards of particularity which must be met by any non-disclosure statute in order to bar release of documents under the Freedom of Information Act. Because the steps required by section 6(b)(1) do not satisfy these standards, section 6(b)(1) does not qualify as an Exemption 3 statute.

Therefore, the circuit court erred in interpreting section 6(b)(1) as applicable to FOIA requests, and erroneously held that the Consumer Product Safety Commission's non-compliance with any of section 6(b)(1)'s requirements is sufficient to bar release of information requested under the FOIA.

ARGUMENT

I. SECTION 6(b)(1) OF THE CONSUMER PRODUCT SAFETY ACT DOES NOT APPLY TO RECORDS REQUESTED UNDER THE FREEDOM OF INFORMATION ACT.

A. Section 6(b)(1) Is Inconsistent with the FOIA.

The court of appeals determined that section 6(b)(1)is not limited to the affirmative publication of material by the Commission but is also applicable to records requested under the FOIA. However, not only is this interpretation unsupported by the terms of section 6(b)(1), but it is also inconsistent with the mandatory prompt disclosure requirements of the FOIA.

1. The FOIA Is A Broad Remedial Statute That Requires Prompt Disclosure to Requesters.

In enacting the FOIA, Congress re-evaluated the Nation's law and policy regarding public access to government-held information, and adopted a sweeping revision "whose basic purpose reflected 'a general philosophy of full agency disclosure.' " *Department of the Air Force v. Rose,* 425 U.S. 352, 360 (1976), *quoting* S. Rep. No. 89-814, 89th Cong., 1st Sess. 3 (1965). As this Court noted in *EPA v. Mink,* 410 U.S. 73, 80 (1973), the FOIA "seeks to permit access to official information long shielded unnecessarily from public view."

This legislation contains two features that are particularly crucial to its broad disclosure purpose. First, the FOIA requires disclosure of all agency records except those within the reach of one of the FOIA's nine exemptions. 5 U.S.C. §552(a)(3). Even where an exemption is applicable, however, the agency is free to voluntarily disclose the material requested. *Chrysler Corp. v. Brown,* 441 U.S. 281, ____, 99 S. Ct. 1705, 1713-14 (1979). The limited reach of the exemptions, and their permissive nature, are essential to the FOIA's disclosure policy.

Second, the FOIA contains a procedural framework designed to further the substantive goal of disclosure. Under the FOIA, each agency which receives a request for records must make "prompt" disclosure of all nonexempt documents, 5 U.S.C. §552(a)(3). *See* Pub. L. No. 90-23, 81 Stat. 54 (1967). And under the 1974 amendments to the FOIA, the agency must initially determine whether to comply with that request within ten working days, 5 U.S.C. §552(a)(6)(A)(i). *See* H.R. Rep. No. 93-876, 93d Cong., 2d Sess. 2 (1974). These provisions ensure that agencies may not delay the disclosure of records and thereby blunt the purpose and effect of the FOIA's mandatory disclosure requirement.

It is only against this backdrop of the FOIA's structure and purpose that the court of appeals' interpretation of section 6(b)(1) can be adequately assessed.

2. The Requirements of Section 6(b)(1) Are Inconsistent With The Mandatory Prompt Disclosure Scheme Of The FOIA.

Section 6(b)(1) generally provides that information obtained by the Commission under the CPSA, from which the identity of a manufacturer or private labeler may be readily ascertained, may not be publicly disclosed until the Commission completes certain steps. Specifically, section 6(b)(1) postpones any public disclosure of such information until the manufacturer or labeler is given 30

days notice and a reasonable opportunity to comment, and until the Commission takes "reasonable steps to assure" that the information is "accurate" and that disclosure would be "fair in the circumstances" and "reasonably related to effectuating the purposes" of the CPSA.[2]

The procedures required by section 6(b)(1) are invariably time-consuming. While requiring a minimum of 30 days, as a practical matter the pre-disclosure process is likely to extend far beyond that span of time. Even assuming the Commission had adequate staff, the independent Commission investigation entailed by the process of verification alone would inevitably result in lengthy delays beyond the specific time period for "prompt" disclosure required by the FOIA,[3] and could require a massive expenditure of scarce Commission resources. For example, in order for the Commission to disclose the content of a single consumer product safety complaint, it could be required to consider whether in fact a particular product caused an injury to a particular consumer, in the particular way alleged.[4] Given the complexities of consumer product failure, this would prove to be a major, if not impossible, task. Similarly, for extensive product studies, tests, or compilations of

[2]Section 6(b)(1) is set out in Appendix A.

[3]In this case the basic accident report data was compiled by the plaintiffs-manufacturers. Moreover, some of the information was more than five years old at the time it was requested, rendering the verification task even more difficult.

[4]Unfortunately, the court of appeals chose not to evaluate the impact of its interpretation of §6(b)(1) on the Commission's ability to carry out the section's requirements. Rather, the court facilely avoided such difficulties by concluding that section 6(b)(1) is a witholding statute. See p. 22, *infra*.

safety data, reasonable assurances of accuracy would require inestimable Commission staff, time and energies.[5]

Furthermore, inasmuch as section 6(b)(1) sets no maximum time limit for Commission investigations, it does not prevent or even discourage lengthy investigations. In order to prevent court challenges alleging that the Commission failed to take "reasonable steps" to determine the accuracy of information, the Commission might well be encouraged to undertake unnecessarily careful and lengthy investigations prior to the disclosure of information.[6]

The delay and uncertainty inherent in section 6(b)(1)'s operation would effectively eviscerate the FOIA's fundamental emphasis on mandatory prompt disclosure, with the result of severely limited public access to records produced or received by the Commission and, consequently, little opportunity for public insight into its activities.

Indeed, the Second Circuit in its recent ruling upholding the Commission's position that the requirements of section 6(b)(1) are not applicable to requests under the FOIA, noted precisely these inconsistencies

[5]Typical of the difficulties involved are those posed by the following hypothetical: the Commission retains a technical consultant to prepare a report considering the potential hazard posed by a particular consumer product. What is the Commission obligated to do under §6(b)(1) if the consultant's report is requested under the FOIA? Is the Commission required to study the technical soundness of the study it originally requested? Should it commission another study to evaluate the accuracy of the first study? It is difficult to believe Congress intended such absurd results.

[6]Indeed, in light of the effort involved in fulfilling §6(b)(1)'s requirements, Commission staff might be anxious to find ways to avoid disclosure, such as giving an excessively broad reading to the FOIA's exemptions.

between the two statutes. *Pierce & Stevens Chemical Corp. v. Consumer Product Safety Commission,* 585 F.2d 1382, 1387-88 (1978). That court stated:

> [The FOIA] calls for prompt disclosure of all non-exempt documents, notably short administrative deadlines and unusually speedy court procedures; e.g., a case under the FOIA shall "take precedence" and be "expedited in every way." In contrast, the procedures of 6(b)(1) consume at least 30 days and probably a much longer period before "public disclosure" occurs. Moreover, if the Commission must take "reasonably steps to assure" the accuracy of all information in a record to be disclosed, this would require independent investigation of information received, as here, from another agency some eight years before. Clearly this would involve long delays inconsistent with the purpose of the FOIA.

Id. at 1387-88.

3. The Requirements of Section 6(b)(1) Are Inconsistent With The FOIA's Requirement To Release Existing, Not Newly-Created Records.

The Freedom of Information Act requires only the release of existing agency records; the agency is not required to create explanatory material. *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 161-62 (1975). Yet section 6(b)(1) requires the Commission to take "reasonable steps" prior to the public disclosure of material to assure accuracy of the documents to be disclosed. Such steps obviously contemplate rewriting of certain material where necessary, as the court below acknowledged, 598 F.2d at 804, and as noted by the Second Circuit in

Pierce & Stevens Chemical Corp. v. Consumer Product Safety Commission, 585 F.2d at 1388. But the basic principle underlying the FOIA is that the public has a right to know information upon which the government relies in making decisions, regardless of the accuracy of that information. Indeed, accuracy is a subjective term, and the members of the public, as well as government, should have an opportunity to determine the relative accuracy of material in the government's possession.

4. The Requirements Of Section 6(b)(1) Conflict With The Requirement That Under The FOIA, Documents Must Be Released To "Any Person".

The FOIA requires that documents released under its authority must be released to "any person". It "precludes consideration of the interests of the party" seeking release. *Soucie v. David,* 448 F.2d 1067, 1077 (D.C. Cir. 1971). *See also, NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 143 n.10 (1975). Congress noted when it passed the Act nearly 15 years ago that one of the intended effects of the FOIA is to eliminate "the 'properly and directly concerned' test of who shall have access to public records. . . ." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 1 (1966).

The requirement of section 6(b)(1) that the Commission releases documents only after it has determined that release of the information is "fair in the circumstances and reasonably related to effectuating the purposes of the Act" is wholly at odds with Congress' indisputable intent that access to government records should not depend upon the requester's interest in the documents. Any analysis of the fairness of release or the purposes to be served by the release of documents to a particular re-

quester entails scrutiny of the identity of the requester and the requester's intended use of the information. Whether records are sought by an academic, a consumer, or a large corporation, the mandate of the FOIA is disclosure.

Moreover, the consideration of whether release of information would be "fair in the circumstances" could be used as a shield against public scrutiny of CPSC decisions. For example, a decision not to release files of an aborted investigation into the safety of a certain consumer product might easily be guarded from the public eye by a determination that release would not be "fair in the circumstances."[7] Such a determination would unfortunately serve to protect not only the manufacturer involved but the basis for the Commission's decision, as well.

In summary, section 6(b)(1)'s procedures are clearly at odds with the essential disclosure scheme of the FOIA, carefully crafted and thoroughly deliberated by Congress, which requires prompt disclosure of existing documents. If the Third Circuit's reading is to be accepted, this Court must conclude that Congress intended to repeal by implication the explicit requirements of the FOIA, where requesters seek information from the Commission. As discussed below, such a reading is unwarranted, and contrary to a fair reading of the statute and its relevant legislative history.

[7]Once information is the subject of an administrative or judicial proceeding under the CPSA, the procedures of §6(b)(1) do not apply. Section 6(b)(2), 15 U.S.C. §2055(b)(2). But information obtained under the CPSA about which the Commission takes no action remains subject to §6(b)(1). Therefore, if §6(b)(1) applied to FOIA requests, information concerning Commission proceedings could be disclosed, but the information relating to the failure of the Commission to institute appropriate actions could not be brought promptly to light using the FOIA.

B. Both The Language And The Legislative History Of Section 6(b)(1) Indicate Congress' Intent To Limit The Section To The Publication Of Information Initiated By The Commission.

The court below concluded that Congress intended section 6(b)(1) to apply to disclosures of information under the Freedom of Information Act as well as to affirmative, official releases, news conferences, and publication of reports. 598 F.2d at 811. But neither the language of section 6(b)(1) nor its legislative history supports the Third Circuit's application of section 6(b)(1) to FOIA requests. A careful analysis reveals no congressional intent to undermine the procedural and substantive framework of the FOIA with respect to consumer product safety information. Rather, both the language and the legislative history of section 6(b)(1) indicate Congress' intent to apply that provision's procedures only to the affirmative publication of information by the Commission.[8] By giving section 6(b)(1) this limited reach, Congress avoided doing violence to its overriding policy of prompt disclosure under the FOIA.

Section 6(b)(1) makes repeated reference to the "public disclosure" of information by the Commission. We submit that, by using the word "public", Congress meant something more than mere disclosure, particularly when considered in light of the FOIA, which requires the release of information upon request. This conclusion is borne out by the contrast between section 6(a)(2)'s ban on the "disclosure" of trade secrets and other con-

[8]Illustrative of this intended reach is Relco, Inc. v. Consumer Product Safety Commission, 391 F. Supp. 841 (S.D. Tex. 1975), where §6(b)(1) was triggered when the Commission issued a press release and "censored" a product.

fidential business information, and the "public disclosure" language of section 6(b)(1). Section 6(a)(2) is clearly applicable to FOIA requests and broadly applies to *all* disclosures.[9] It would indeed be anomalous for Congress, in the same section of the CPSA, to utilize different terminology if it intended the same reach in sections 6(a)(2) and 6(b)(1).[10]

Similarly, section 6(b)(1) requires that if the Commission improperly "publicly" discloses inaccurate or misleading information, the Commission "shall, *in a manner similar* to that in which [the original] disclosure was made, *publish* a retraction." (emphasis supplied). As it is virtually impossible to "publish" a retraction in a manner similar to the release of records under the FOIA, this is further indication that Congress did not contemplate the application of section 6(b)(1)'s requirements to FOIA requests.[11] The Second Circuit in *Pierce & Stevens,* 585 F.2d at 1387, recognized this inconsistency, noting that "[t]his language seems to envision agency-initiated publicity, via press release or otherwise, rather than a mere request for a document under the FOIA." Yet the Third Circuit dismissed this argument with the assertion that the Commission could "conceivably . . . 'publish a retraction' in a similar manner by releasing correcting information to the same FOIA requesters who had received the earlier inaccurate material." Of course the Commission could inform the requesters of inaccuracies, but this would hardly amount to "publication" of a retraction.

[9]Section 6(a)(2)'s absolute prohibition against disclosure qualifies it as a "withholding" statute within the meaning of Exemption 3 of the FOIA.

[10]Otherwise the word "public" serves no purpose. It is a well recognized rule of statutory construction that the words of statutes are to be given effect and not to be construed as surplusage. *See, e.g.,* Klein v. Republic Steel Corp., 435 F.2d 762, 766 (3d Cir. 1970). "[W]ords in statutes should not be discarded as 'meaningless' and 'surplusage' when Congress specifically included them, particularly where the words are excluded in other sections of the same act." United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972).

[11]*See also* H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. 32 (1972).

Therefore, from the face of the statute, it is clear that Congress intended section 6(b)(1) to have a limited reach, to accomplish a limited purpose.[12] This intent becomes even more obvious upon an examination of section 6(b)(1)'s legislative history.

Although the contemporaneous legislative history of section 6(b)(1) is sparse, it nonetheless provides sufficient evidence to determine the legislative intent behind its enactment. Congress feared the Commission might affirmatively publicize product safety information which was unfair or inaccurate, and thereby damage the reputations of consumer products' manufacturers, and labelers.[13] Such a concern is understandable and, we submit, it is to this dissemination of adverse publicity, as an extension of the Commission's enforcement mechanism, that Congress sought to attach particular protections.[14]

[12]This reading is buttressed by §6(b)(1)'s requirements that the Commission take reasonable steps to assure the fairness of public disclosure and its reasonable relationship to effectuating the purpose of the CPSA. Such considerations are relevant to a Commission decision to initiate disclosure but, without more, seem out of place with respect to the request for material under the FOIA.

[13]Part of the Commission's function is to "*disseminate* injury data, and information, relating to the causes . . . of death, injury, and illness associated with consumer products." 15 U.S.C. §2054(a)(1) (emphasis added).

[14]*Relco, supra,* is a classic illustration.*See also,* H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. 31-32 (1972). During the debate on the Consumer Product Safety Act, Congressman Crane recalled the Federal Trade Commission's erroneous and damaging public condemnation of a Zerex commercial.

(footnote continued)

The harm associated with the disclosure of inaccurate or unfair consumer product safety information can be significant where the Commission places it imprimatur on the material by initiating its publication. Absent the Commission's affirmation of the information, however, the weight of the Commission's authority simply is not introduced into the marketplace.

This interpretation is bolstered by other aspects of the contemporaneous legislative history. The House Report accompanying a version of the bill which includes section 6(b)(1) made numerous references to the Commission "disseminating" information. *See* H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. 32 (1972). The use of this term implies that the House Committee, which drafted the version of section 6(b)(1) which eventually became law, was concerned with affirmative Commission disclosures, rather than responses to FOIA requests. Releasing information to an FOIA requester cannot ac-

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(*footnote continued*)

> What the FTC did was to call a press conference in November 1970 and make a "proposed complaint" against Du Pont, alleging, without proof, that the television commercial was misleading, that the antifreeze actually damaged automotive cooling systems, and that it had been inadequately tested. The Federal Agency then publicly threatened to ban the product.
>
> Officials at Du Pont were not even informed of the FTC's action before the Washington press conference.
>
> * * *
>
> Equally important is the fact that the FTC turned out to be wrong. It dropped the charge. . . that the product could cause damage. The FTC, in fact, found nothing wrong with the product in any way.
>
> The financial damage had, of course, already been done. 118 Cong. Rec. 31389 (September 20, 1972).

curately be described as "disseminating" that information.[15]

Perhaps the most telling aspect of the legislative history is its very failure to indicate that Congress intended section 6(b)(1) to cover requests made under the FOIA. Only a few years before passage of the CPSA, Congress enacted a carefully developed procedural and substantive scheme for guaranteeing public access to information in the hands of government officials.

It is inconceivable that Congress could have intended to nullify the application of that scheme to information in the hands of the Consumer Product Safety Commission, an agency which Congress expressly charged with "assist[ing] consumers in evaluating the comparative safety of consumer products." 15 U.S.C. §2051(b)(2). Yet the opinion of the court of appeals implies that Congress, without a word of explanation, and through the use of language not fitting the individualized release to an FOIA requester, made just such a wholesale exception to its mandate of prompt disclosure. We submit that such an interpretation of section 6(b)(1) is erroneous.

Furthermore, the Third Circuit's analysis of the legislative history of the section is faulty, relying on inconclusive fragments of statements and reports to reach its mistaken conclusion as to Congress' intent. For example, the court relied on a statement by the Department of Health, Education, and Welfare merely

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[15] "Disseminate" is defined in Webster's Third New International Dictionary (unabridged ed.) as "to spread or send out freely or widely . . . make widespread . . . to foster general knowledge of: broadcast, publicize . . . ."

paraphrasing[16] the provisions of an earlier version[17] of section 6. The statement shed absolutely no light on the proper interpretation of the version of the bill under discussion, and certainly provided no insight whatsoever into the proper interpretation of the provision eventually enacted. Similarly, the court relied on the fact that the House Committee on Interstate and Foreign Commerce "made no distinction between those aspects of section 6 expressly governing FOIA requests and the provisions of section 6(b)(1)." But the fact that the Committee made no express reference to the distinction does not indicate that the Committee had an understanding that section 6(b)(1) should apply to FOIA requests. To the contrary, throughout the passage relied on by the court, the Committee spoke of the requirements of section 6(b)(1) as it applies to information "disseminated" by the Commission, a term which clearly implies broader disclosure than the release to a single requester under the FOIA.[18]

Moreover, any doubt as to the proper interpretation of section 6(b)(1) should be removed after consideration of that section's subsequent legislative history. In 1976, section 29(e) of the CPSA, 15 U.S.C. §2078(e), was amended to prohibit any agency that received accident and investigation reports from the Commission from releasing such information unless the Commission com-

[16]The statement read, in part: "Section 4(c) [now section 6] would also require the provision of thirty days notice to the manufacturer of any consumer product prior to the Secretary's public disclosure of information respecting that product, if such information would reveal the manufacturer's identity." Consumer Product Safety Act: Hearings Before the Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce, 92d Cong., 1st Sess., 188 (1971-1972), *cited in GTE*, 598 F.2d at 807.

[17]That version was section 4(c) of H.R. 8110, 92d Cong., 1st Sess. (1972).

[18]See n. 15. *supra.*

plied with section 6(b)(1).[19] The Conference Report, in discussing this amendment, stated:

> The requirement that the Commission comply with section 6(b) prior to another Federal agency's public disclosure of information obtained under the Act is not intended by the conferees to supersede or conflict with the requirements of the Freedom of Information Act, 5 U.S.C. §552(a)(3) and (a)(6). *The former relates to public disclosure initiated by the Federal agency while the latter relates to disclosure initiated by a specific request from a member of the public under the Freedom of Information Act.* H.R. Rep. No. 1022, 94th Cong., 2d Sess., 27 (1976) (emphasis added).

This subsequent legislative history clearly confirms the congressional intent, as determined from the face of the statute and the prior legislative history, and is consistent with the purposes and intent of the FOIA. Under circumstances such as these, this Court has indicated that subsequent expressions of congressional intent are "entitled to great weight in statutory construction." *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 381 (1969); *Glidden Co. v. Zdanok*, 370 U.S. 530, 541-42 (1962); *Fedeal Housing Administration v. The Darlington, Inc.*, 358 U.S. 84, 90 (1958); *Mount Sinai Hospital of Greater Miami, Inc. v. Weinberger*, 517 F.2d 329, 343 (5th Cir. 1975), *cert. denied sub nom. Mt. Sinai Hospital of Greater Miami, Inc. v. Mathews*, 425 U.S. 935 (1976).

The Third Circuit was "unwilling to accept" this clear indication of congressional intent, believing it to be an

[19]Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, §15, 90 Stat. 510 (1976).

"isolated" and "erroneous" conclusion of a later congressional committee. *GTE,* 598 F.2d at 811. But the cases cited by the court merely hold that subsequent legislative history may be of little value in inferring the Congress' prior intent where the subsequent legislative history is not a clear statement of intent or where it conflicts with the "plain congressional purpose" as expressed in the prior legislative history. *United States v. Philadelphia National Bank,* 374 U.S. 321 (1963); *United States v. Price,* 361 U.S. 304 (1960). However, in this case the subsequent legislative history is clear and consistent with the prior legislative history.

In short, a careful analysis of the language of section 6(b) (1) and its complete legislative history reveals that Congress did not intend to apply section 6(b)(1)'s procedures to requestes under the FOIA. Moreover, to interpret section 6(b)(1) otherwise would do violence to the FOIA's requirement of prompt disclosure, and attribute to Congress a *sub silentio* repeal of the FOIA with respect to consumer product safety information.

II. SECTION 6(b)(1) OF THE CONSUMER PRODUCT SAFETY ACT DOES NOT ESTABLISH PARTICULAR NON-DISCLOSURE CRITERIA AS REQUIRED BY EXEMPTION 3 OF THE FOIA.

As this Court has recognized, the Freedom of Information Act is broadly conceived and is intended to permit public access to information unnecessarily shielded from public scrutiny. "It . . . attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA v. Mink,* 410 U.S. 73, 80 (1973). Thus "disclosure, not secrecy, is the dominant objective of the Act," and the nine exemptions from mandatory disclosure set forth in

the FOIA, 5 U.S.C. §552(b)(1)-(9), "are explicitly made exclusive . . . and must be narrowly construed." *Department of the Air Force v. Rose,* 425 U.S. 352, 361 (1976).

The third exemption to the FOIA, 5 U.S.C. §552(b)(3) permits agencies to withhold from public disclosure materials covered by a limited and narrow class of substantive statutes. In its original form, Exemption 3 was limited to matters "specifically exempted from disclosure by statute." 5 U.S.C. §552(b)(3) (1970) (amended 1976). However, Congress amended Exemption 3 in 1976 expressly to overrule the Court's decision in *Administrator, FAA v. Robertson,* 422 U.S. 255 (1975). *Robertson* held that Exemption 3 included those statutes vesting in agency officials wide discretion to withhold matters requested pursuant to the FOIA.[20] In overruling *Robertson,* Congress left no doubt as to the narrow scope of Exemption 3. The House Report, explaining the amendment stated:

> Believing that the decision misconceives the intent of exemption (3), the committee recommends that the exemption be amended to exempt only material required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information. The commitee is of the opinion that this change would eliminate the gap created in the Freedom of Information Act by the *Robertson* case without in any way endangering statutes such as the Atomic Energy Act of 1954, 42 U.S.C. §§2161-66, which pro-

[20]The statute in *Robertson* allowed the withholding of information where disclosure was not "required in the interest of the public". 49 U.S.C. § 1504.

> vides explicity for the protection of certain nuclear data.
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> H.R. Rep. No. 94-880, 94th Cong., 2d Sess. 23, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 2205.

Thus, in its current form, Exemption 3 is applicable only to those matters:

> specifically exempted from disclosure by statute (other than section 552(b) of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld. 5 U.S.C. §552(b)(3).

The Third Circuit, in an attempt to reconcile the irreconcilable,[21] concluded that ". . . the perceived inconsistencies between section 6(b)(1) and the FOIA will be minimized if the former provision is, in fact, a withholding statute within the meaning of Exemption 3, granting the Commission the discretion not to disclose material subject to its provisions." *GTE*, 598 F.2d at 813.

The problem with this approach is not only that it fails to minimize the inconsistencies between the two statutes[22] but that Congress did not include "minimization of inconsistencies" as a basis for findings that a statute falls within the ambit of Exemption 3. Like the proverbial square peg in a round hole, section 6(b)(1) does not fit within the congressionally mandated scope of Exemption 3.

[21]See Argument, *supra* at 13.

[22]The scenario offered by the court of appeals at 598 F.2d 812-13, for the Commission's handling of FOIA requests if section 6(b)(1) is a withholding statute is unworkable. The Court speaks of materials which the Commision could easily determine to obviously portray a factual situation inaccurately. Indeed, it is doubtful that among the thousands of consumer letters referring to accidents which the manufacturers in this case turned over to the Commission, even five

(footnote continued)

Section 6(b)(1) does not meet even the threshold requirement of Exemption 3 for it clearly does not specifically exempt information from disclosure. To the contrary, the section authorizes disclosure and provides only that certain steps be taken by the Commission prior to disclosing information to the public. Such steps, far from contemplaitng withholding, are clearly procedural prescriptions to the Commission which, in preparation for any intended disclosure, the Commission is required to carry out. *Cf. Mobil Oil Corp. v. FTC*, 406 F. Supp. 305 (S.D.N.Y. 1976) (statute authorizing disclosure does not forbid disclosure) *Id.* at 310. Yet, the Third Circuit

(footnote continued)

percent could be labeled obviously inaccurate on their face. Only a complaint as outrageous as the statement "my television bit me on the arm" would enable the Commission staff to easily conclude that the description was "obviously inaccurate." Under the Third Circuit's scenario, nearly every one of the accident reports sought by the requesters in this case would have to be investigated by the Commission.

Equally absurd is the court's assertion that the Commission "could inform the requester that release would be forthcoming pending 30 days notice to the manufacturers identified in that material." This, however, is not the end of the process. It simply shifts the review to the manufacturers to determine whether or not they will agree that the actions of the Commission indeed amounted to reasonable steps to assure accuracy, fairness and achieving the purposes of the CPSA. If they disagreed, of course, they could initiate litigation which could extend the 30 days indefinitely.

Where the disclosure is of Commission-generated information the situation is obviously different. The Commission is free to select the materials it wishes to release and the context in which it wishes to make the release.

upheld the district court's determination that section 6(b)(1) was a withholding statute under Exemption 3.

Even if section 6(b)(1) specifically exempts material from disclosure, as it does not, it fails to establish particular criteria for withholding, as required by subsection (B) of Exemption 3.[23] Nevertheless, the district court concluded, and the court of appeals agreed, that the following language established the particular criteria for withholding:[24]

> The Commission shall take *reasonable steps to assure,* prior to its public disclosure . . . *that information* from which the identity of [a] manufacturer or private labeler may be readily ascertained *is accurate,* and that such *disclosure is fair in the circumstances* and *reasonably related to effectuating the purposes* of this chapter. (emphasis added). 15 U.S.C. §2055(b)(1).

Without attempting any serious analysis of subsection (B) of Exemption 3 in relationship to section 6(b)(1), the Third Circuit endorsed the erroneous conclusion of the district court that a statute establishing such vague requirements as does section 6(b)(1) satisfies Congress'

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[23]It is plain that §6(b)(1) does not flatly ban disclosure under subsection 3(A). Neither the district court nor the court of appeals decided whether §6(b)(1) satisfied the "particular types of matters" requirement of subsection (B), but clearly it does not.

[24]The court of appeals stated:

> The district court found that section 6(b)(1), in requiring the Commission to take reasonable steps to assure accuracy, fairness, and the service of a statutory purpose prior to disclosing information identifying individual manufacturers, established particular criteria for withholding within the meaning of Exemption 3. *GTE,* 598 F.2d at 813.

detailed and narrow standard. The Third Circuit's decision in this case brings us full circle to the Court's holding in *Robertson.* For what the decision does is to allow this Commission and all other agencies with similarly vague, subjective, and therefore highly discretionary statutes, to deny the public its right to information from possibly unwilling officials. *Cf. Mink,* 410 U.S. at 80. Given the 1976 Amendments to Exemption 3, that is clearly not what Congress intended.

Examples of statutes that could justify withholding under the amended Exemption 3 emphasize this point. Sections 706(b) and 709(e) of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e-5(b), 2000e-8(e); section 314(a)(3) of the Federal Election Campaign Act, 2 U.S.C. §437(g)(a)(3) and section 801 of the Federal Aviation Act of 1958, 49 U.S.C. §1461, are cited as examples in the House Report.[25]

The common thread throughout these statutes is the clear command they convey and the exact standards they establish. Section 706(b) of the Civil Rights Act of 1964, as amended, in relevant part states:

> *Charges* shall not be made public by the Commission. . . . Nothing said or done during and as a part of such *informal* [conciliation] endeavors may be made public by the *Commission, its officers or employees* . . . without the written consent of the *persons* concerned. (Emphasis in original).

Section 709(e) of the same Act likewise states:

> It shall be unlawful for any officer or employee of the Commission to make public in any man-

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[25]H.R. Rep. No. 880, 94th Cong., 2d Sess. 23 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News at 2205.

> ner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information.

The other examples are also clear in their commands and establish precise standards for withholding information. Section 314(a)(3) of the Federal Election Campaign Act states:

> Any notification of investigation . . . shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

And, section 801 of the Federal Aviation Act of 1958 states "any order of the Board . . . shall be submitted to the President before publication thereof."

Compared to these statutes that were explicitly isolated as examples of statutes intended to be covered by Exemption 3, section 6(b)(1) is unmistakably not cast in the same mold. They state clear, precise, objective criteria for determining when to disclose information. Section 6(b)(1), on the other hand, does not. None of its requirements convey the objective standards as do the examples quoted above.

If nothing else, the labored development of our tort law has amply demonstrated that there is a wide spectrum of "reasonable" behaviors. A reasonable man test hardly serves as a precise vehicle to transmit to the Commission the congressional will with respect to product safety disclosure decisions. On the contrary, this amorphous requirement infects each of section 6(b)(1)'s

three standards with the imprecision the 1976 amendment sought to eliminate.

Similarly, the criterion "reasonably related to effectuating the purpose of this Act" is nearly beyond measure. The Consumer Product Safety Act's purposes are: (1) to protect the public against unreasonable risks of injury associated with consumer products; (2) to assist consumers in evaluating the comparative safety of consumer products; (3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and (4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries. 15 U.S.C. §2051(b). If every disclosure request under the FOIA must first be subjected to a Commission determination that it is reasonably related to achieving the purposes of the CPSA, then obviously the 1976 Amendments to Exemption 3 were unnecessary.

The case law relied upon by the court of appeals also fails to offer any support for its conclusion; instead, the cases further highlight the errors in its reasoning. *American Jewish Congress v. Kreps*, 574 F.2d 624, 628-29 (D.C. Cir. 1978), which the Third Circuit relied upon to support its conclusion states:

> Nondisclosure is countenanced by subsection (B) if, but only if, the enactment is the product of congressional appreciation of the dangers inherent in airing particular data and *incorporates a formula whereby the administrator may determine precisely whether disclosure in any instance would pose the hazard that Congress foresaw.* But section 6(b)(1)'s language does not provide "a formula whereby the [Commission] may determine precisely"

> whether to disclose. Indeed, it does the opposite. It provides the Commission with *carte blanche* to determine if its steps are "reasonable", if its action would be "fair in the circumstances", and "reasonably related to effectuating the purposes of the [Act]".[26]

Similarly, the Ninth Circuit in *Lee Pharmaceuticals v. Kreps*, 577 F.2d 610 (9th Cir. 1978), while applying what the Third Circuit referred to as its own pre-*Robertson* reasoning, concluded that 35 U.S.C. §122 "provides for non-disclosure of particular types of matters, patent applications, thus falling squarely within provision (B) of Exemption 3." *Id.* at 616. Unlike section 6(b)(1), however, the statute in *Lee Pharmaceuticals* stated with unmistakable clarity Congress' intent that certain matters not be made public.[27]

Thus, as we have demonstrated above, the court of appeals erred in determining that Congress intended the procedural requirements of section 6(b)(1) of the Consumer Product Safety Act to be applicable to requests for information under the FOIA. Rather, application of the section is limited to Commission-generated

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[26]We disagree with the court of appeals' view of the hazard Congress intended to eliminate by section 6(b)(1). As we show above, the hazard was that of Commission-generated adverse publicity, not the use of materials received by a requester under the FOIA. Regardless of the use, the latter simply never bears the official imprimatur of government condemnation, while the former clearly does.

[27]35 U.S.C. §122 provides:

> Applications for patents shall be kept in confidence by the Patent Office and no information concerning the same given without authority of the applicant or owner unless necessary to carry out the provisions of any Act of Congress or in such special circumstances as may be determined by the Commission.

ERRATUM

The passage on pp 27-28 should read as follows:

> Nondisclosure is countenanced by subsection (B) if, but only if, the enactment is the product of congressional appreciation of the dangers inherent in airing particular data and incorporates a formula whereby the administrator may determine precisely whether disclosure in any instance would pose the hazard that Congress foresaw. (emphasis added).

But section 6(b)(1)'s language does not provide "a formula whereby the [Commission] may determine precisely" whether to disclose. Indeed, it does the opposite. It provides the Commission with carte blanche to determine if its steps are "reasonable", if its action would be "fair in the circumstances" and "reasonably related to effectuating the purposes of the [Act]".[26]/

disclosures, the only type likely to cause the harm Congress intended to avoid. The court also erred in holding that section 6(b)(1) meets the stringent requirements of the amended Exemption 3 of the FOIA.

CONCLUSION

For the foregoing reasons, the Third Circuit's conclusions that section 6(b)(1) is applicable to FOIA requests and that the section falls within Exemption 3(B) are erroneous and therefore should be reversed.

Respectfully submitted,

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APPENDIX

Section 6(b)(1) of the Consumer Product Safety Act, 15 U.S.C. §2055(b)(1), provides:

> Except as provided by paragraph (2) of this subsection, not less than 30 days prior to its public disclosure of any information obtained under this Act, or to be disclosed to the public in connection therewith (unless the Commission finds out that the public health and safety requires a lesser period of notice), the Commission shall, to the extent practicable, notify, and provide a summary of the information to, each manufacturer or private labeler of any consumer product to which such information pertains, if the manner in which such consumer product is to be designated or described in such information will permit the public to ascertain readily the identity of such manufacturer or private labeler, and shall provide such manufacturer or private labeler with a reasonable opportunity to submit comments to the Commission in regard to such information. The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this Act. If the Commission finds that in the administration of this Act, it has made public disclosure of inaccurate or misleading information which reflects adversely upon the safety of any consumer product, or the practices of any manufacturer, private labeler, distributor, or

retailer of consumer products, it shall, in a manner similar to that in which such disclosure was made, publish a retraction of such inaccurate or misleading information.